

OPINIONS
OF THE
Corporation Counsel and
Assistants

FROM

April 16, 1924, to April 15, 1925.



Compiled and Edited by
FRANCIS X. BUSCH
Corporation Counsel

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EDITOR'S NOTE.

This volume, covering the period from April 16, 1924, to April 15, 1925, is the second of the series of selected opinions rendered by the Law Department of the City of Chicago during the administration of Mayor William E. Dever. The first of these volumes contains a preface which was designed to apply to this volume as well as to the one in which it appears, and there is, therefore, no occasion for an extended statement in this volume.

FRANCIS X. BUSCH,
Corporation Counsel.



OPINIONS
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FROM
APRIL 16, 1924, TO APRIL 15, 1925.

**Permission by Superintendent of Police To Conduct
Street Parades.**

April 16, 1924.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

Answering your request for information relative to your power to refuse a permit for a parade and a band wagon by the Garment Makers' Union, we desire to advise you that The Chicago Municipal Code of 1922 vests in the Superintendent of Police, the power to grant permits for processions and parades, and to refuse the same under certain circumstances.

Section 3703 of the Code is as follows:

"3703. Processions and open-air meetings—applications for permit.) No parade or procession shall be allowed upon any street or public way in the city, nor shall any open-air public meeting be held upon any ground abutting any street or public way in the city, until a permit in writing therefor shall first be obtained from the police department. Application to conduct such parade or procession or open-air meeting shall be

made in writing to the superintendent of police by the person or persons in charge or control thereof, or responsible therefor, and such application shall set forth the route along which such parade or procession is to proceed, the time of starting, and the name or names of the person or corporation or society in control thereof or responsible therefor, and the purpose of such parade and procession; and, in case of an open-air meeting, such application shall specify the place at which it is desired to hold such meeting, the purpose thereof, and the name of the person, corporation or society in control thereof or responsible therefor, the time at which such public meeting is to be held, and the probable duration thereof. Upon such application being made, the superintendent of police shall investigate or cause to be investigated the person, corporation or society making such application and the truth of the statements made in such application regarding the purpose or object of such parade, procession or open-air meeting, and if he shall find that such parade, procession or open-air meeting is not to be held for any unlawful purpose and will not in any manner tend to a breach of the peace, or unnecessarily interfere with the public use of the streets and ways of the city or the peace and quiet of the inhabitants thereof, he shall issue such permit to the person, corporation or society making application therefor, without fee or charge."

According to the aforesaid section of the Code, you have the power to refuse this permit, if, in your opinion, after investigating the application for a permit and the statements made in such application, you are of the opinion that the said parade or procession is to be held for an unlawful purpose, or if you are of the opinion that it will in any manner tend to create a breach of the peace, or will unnecessarily interfere with the public streets and ways of the City, or the peace and quiet of the inhabitants thereof.

In view of the recent demonstrations by the members of the Garment Makers' Union who are now on strike, it may be that in your judgment, you will determine that such a parade as that contemplated in the application would tend to create a breach of the peace. That, however, is a question

which lies within your discretion and is solely for you to determine after investigating all of the facts.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Interpretation of Automobile Repair Shop Ordinance —Meaning of Word “Engaged.”

April 16, 1924.

HON. THOMAS P. KEANE, City Collector.

Dear Sir:

We have your letter of recent date concerning license fees to be charged to automobile repair shops. These fees are based on the size of the business. Your inquiry is directed to the question of the number of persons who are to be regarded as “engaged.”

Section 272, which fixes the fees, provides a graduated fee. There is a minimum fee “where one person is engaged,” a higher fee “where two persons are engaged,” etc. You state that questions arise as to whether clerical help, salesmen, etc., should be included in the aggregate, or whether the number should be limited to the persons actually engaged in doing repair work. You cite two instances: one where the business consists of repair work exclusively and there are three mechanics, one clerk, and the owner supervising but doing no actual repair work; the other where the main business is that of selling automobiles, but which has a service department employing one mechanic doing repair work.

In construing legislative acts it is proper to assume that where the same act contains different language relating to a particular thing at two places, a different meaning was intended. Applying this rule, we find that in many cases in The Chicago Municipal Code of 1922 the license fee is based on the "number of employees" or "persons employed." (See Secs. 135, 141, 2564, 2616, etc.) In other places it is based on the "persons engaged." (See Secs. 272, 2468, etc.) In the latter case it seems clear that the legislative intent was that the owner should be included, even though he might not do the particular work in question, because he is actually engaged in the business when he conducts it.

We think, therefore, that it will be proper for you to include the proprietor and even the clerical help as persons "engaged" in those repairs shops where no other business is carried on.

In the case of the automobile salesroom, where only a part of the business is conducted as a repair shop, there does not seem to be any good ground for regarding salesmen, stenographers, or managers as "engaged" in the repair shop. While it may appear a little inconsistent to say that the manager, who necessarily devotes a part of his time to the repair shop, is not to be included in the list of persons to be counted, we believe it would be stretching the meaning of the word to say that he is "engaged" in the repair shop when his work therein is only incidental to his management of the automobile sales business.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Frontage Consents for Hospital—When New Consents
Are Not Required—When Former Use by U. S.
Government Does Not Obviate Necessity of
Obtaining Consents.**

April 16, 1924.

HON. HERMAN N. BUNDESEN, Commissioner of Health.

Dear Sir:

This department is in receipt of your letter of the 7th instant making inquiry as to whether frontage consents will be required before a license shall be issued to operate a hospital at East 47th street and Drexel boulevard.

The building in which it is proposed to operate said hospital, you state, was originally erected for hotel purposes in 1918 but before it was completed it was acquired by the United States Government for hospital purposes during the war; that it was operated by the United States Government as a hospital from 1918 to 1923 when it was abandoned; that private parties have secured the building and made application for a license to operate a hospital; and that two-thirds of the buildings fronting on East 47th street are used exclusively for residence purposes.

Section 930 of Article XXIV of Chapter 17 of The Chicago Municipal Code of 1922 provides:

“930. *Hospital or home frontage consents.*) It shall be unlawful for any person, firm, association or corporation to build, construct, maintain, conduct or manage a hospital, or a home, as defined in Chapter XXXIX of this ordinance, in any block in which two-thirds of the buildings fronting on both sides of the street or streets on or along which the proposed hospital or home may face are devoted exclusively to residence purposes, unless the owners of a majority of the frontage in such block and the owners of a majority of the frontage on the opposite side or sides of the street or streets on or along which said building faces consent in writing to the building, construction or maintaining, managing or conducting of any such hospital or home, in such block; provided, how-

ever, that no new frontage consents shall be required if such hospital or home has heretofore been licensed by the city of Chicago as a hospital, home or nursery at the present location. Such written consents of the majority of said property owners shall be filed with the commissioner of health before a permit shall be granted for the building or construction of any such hospital or home, and before a license shall be issued for the maintaining, conducting or managing of any such hospital or home."

According to your letter two thirds of the buildings on East 47th street are used exclusively for residence purposes, and therefore under the above section of the Municipal Code, frontage consents are necessary in the matter of the license application under consideration unless the proposed hospital falls within the provision which recites:

"Provided, however, that no *new* frontage consents shall be required if such hospital or home has heretofore been *licensed* by the City of Chicago as a hospital, home or nursery at the present location."

Your letter discloses that no hospital has heretofore been licensed at the present location.

During the war the building was acquired by the United States Government and was operated by the United States Government as a hospital for several years, but said United States Government hospital received no license from the regularly constituted authorities of the City of Chicago. It did not require any license to operate.

Section 1851 of Article X of Chapter 39, The Chicago Municipal Code of 1922, provides:

"1851. *License required.*) It shall be unlawful for any person, firm, association or corporation other than the regularly constituted authorities of the *United States*, the State of Illinois, the county of Cook or the city of Chicago, to operate, conduct, manage or maintain any hospital as defined in this article within the corporate limits of the city of Chicago without first obtaining a license therefor as hereinafter provided."

No license having been required for the operation of the said United States Government hospital at said location, consequently, as you state, no frontage consents were ever filed

by a majority of the property owners as required by the ordinance governing the location and operation of hospitals in the City of Chicago.

In the case of *City of Chicago v. Stratton* (162 Illinois 494) in construing a frontage consent ordinance similar to the one applicable to the present case, the court said:

"It is to be noticed that the ordinance does not prohibit the location or construction or keeping of livery stables in blocks which are vacant, or where the buildings are devoted to business purposes or where less than two-thirds of the buildings are devoted to exclusive residence purposes. It forbids the location of such stables in blocks where two-thirds of the buildings are devoted to exclusive residence purposes but provides that they may be located even in such blocks if the owners of a majority of lots therein consent thereto in writing. * * *

"By section 49 the lot owners are not clothed with the power to locate livery stables but are merely given the privilege of consenting that an existing ordinance against the location of a livery stable in such a block as theirs may not be enforced as against their block. They are simply allowed to waive the right to insist upon the enforcement of a legal prohibition which was adopted for their benefit and comfort."

It is conceded that no license was ever granted to operate a hospital at the location under discussion and that no frontage consents were ever filed. The act of the federal government in acquiring the structure before its completion for hospital purposes made impossible and futile the objections of property owners to the use of said structure for hospital purposes.

The present is the first opportunity that the lot owners affected have had to consent or withhold their consent to the operation of a privately conducted hospital at said location, in accordance with the terms of the ordinance.

The United States Government has abandoned the hospital. Private parties desire to conduct a hospital at said location. Under the law, they must procure a license, and, in my judgment, in so far as matters in relation thereto have

been called to the attention of this department, frontage consents of property owners will be required to operate a hospital at the above location in accordance with the terms of the ordinance.

Very truly yours,

WM. L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Removal of Runway From Premises Leased by City.

April 17, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We have your communication of April 15, 1924, relative to the City's occupation of the basement, first floor and second floor of the building situated on Sublot 11 of Assessors' Division of Lots 7 and 8 and the east half of Lot 6 in Block, 40, Original Town. These premises were occupied as a police barn under a lease terminating April 30, 1924. The Police Department has requested that no further renewals of said lease be made. You also enclose leases from which it appears that the Police Department occupied the main floor and basement of said building from May 1, 1898 until April 30, 1912, and since that time the second floor was added to this lease.

Your letter states that a runway for horses from the first floor to the second floor was put in by the City presumably in 1912. We have examined the premises in question. You state that the lessor demands that the City remove said runway and restore the building to its former condition.

At the time the City leased the second floor, in 1912, presumably this runway was built from the main floor to the second floor for the purpose of leading the horses to the second floor and stabling the horses on the second floor. The lease effective for the premises in question, from the 1st day of May, 1912, to the 30th day of April, 1914, has the following clause:

"It is further agreed that the lessee shall have the right to make such alterations, additions and improvements to said building as it shall deem necessary, and before surrendering said premises to the lessors to remove or leave all or any part of such additions and improvements made by it to said premises whether during the term of this lease or prior thereto."

It would seem that all the leases subsequently executed have the same clause practically verbatim. The last lease was executed on the 26th day of April, 1923, effective from the 1st day of May, 1923 to the 30th day of April, 1924, and that lease contains the following clause:

"Lessee shall have the right to make such alterations, additions and improvements on said premises as it shall deem necessary, provided that such additions and improvements whether made during the term of this lease or prior thereto, shall be regarded as removable fixtures, *all or any part of which the Lessee at its election may leave on said premises, or remove prior to the termination of this lease.*"

It is very plain from the examination of these clauses that the City has the right to remove the aforesaid runway or to leave it intact at the expiration of the lease. If, however, the City desires to remove this runway it would have to do so before the expiration of the present lease.

Yours very truly,

FRANK T. HUENING,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Effect of Attorney's Lien Notice on Payment of Assessment Warrant.

April 19, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

You forwarded to this department notice of attorney's lien in the matter of Assessment Warrant No. 49135, letter from the Secretary of the Board of Local Improvements saying that the voucher for payment against which lien is filed has already been issued, and a letter from the claimant, Mr. George P. Foster, in which he states that the lien is good under the decision in *Litz v. Village of West Hammond*, 230 Ill. 310, from which he quotes.

It seems that the claimant represented certain parties in condemnation proceedings in which they were awarded a judgment which is to be paid out of the special assessment warrant when collected. The condemnation vouchers were, however, issued and delivered to the property owners more than six months ago. The question now presented is whether the lien notice is effective and whether you are justified in withholding payment on the voucher. The amount involved is only \$250.00, but the determination of this point may affect your attitude in other cases, and in any event it is a very close and interesting question.

You state in your letter that there have been opinions of the Corporation Counsel holding that where a voucher is delivered to the payee by the City Comptroller the City is absolved from any further liability and that the lien notice could be ignored. Such opinions are subject to the limitation that where the vouchers were payable out of deferred installments this rule did not apply, and the further limitation that such opinions related only to liens of sub-contractors on public improvements.

We call particular attention to the opinion under date of October 11, 1915, which appears on page 338 of the Opin-

ions of the Corporation Counsel and Assistants from May 1, 1915 to June 30, 1916. This seems to cover every point so far as sub-contractors' liens on public improvements are concerned.

This opinion holds, among other things, that when a voucher has been issued payable out of the first installment of a special assessment when collected, such delivery of the voucher would constitute a payment on the part of the city, and notice of lien would be of no legal value. But this is based on the statute relating to sub-contractors' liens on public improvements, which excepts such a case from those under which the lien attaches. The language used is as follows:

"* * * and, provided further, that such lien shall attach only to that portion of such money, bonds or warrants against which no voucher or other evidence of indebtedness has been issued and delivered to the contractor by or on behalf of the county, township, school district, city or municipality as the case may be at the time of such notice."

Section 23 of Mechanics' Lien Law.

This, however, is an attorney's lien, and stands on a different footing entirely. In the case which is regarded as the leading case upholding the constitutionality of the Attorney's Lien Law (*Standidge v. Chicago Railways Co.*, 254 Ill. 524), the Supreme Court expressly stated that the section from which we quote above has no application. (See pp. 530, 531.)

Hence, we cannot say that because there is a statutory provision saying that a sub-contractor's lien will not attach where the voucher has issued, it controls in the case of an attorney's lien. The Legislature may have passed that provision having in mind that such vouchers are often hypothecated by contractors and that an improvement would often be delayed if such voucher is not issued and a loan secured thereon, or it may have had some other good reason which does not apply in the case of an attorney's lien for services in a condemnation case.

The voucher which has issued in the instant case is not a negotiable instrument, and any equities or liens which exist

against the owner or against the fund can be asserted even though it has been delivered. We would not take this position if the warrant had been issued thereon, because a warrant is in the nature of a negotiable instrument, even though it lacks one of the features which are essential in a negotiable instrument. In other words, a warrant is transferable and is of such a nature that the rights of innocent parties may attach as soon as it passes out of the hands of the payee. This is not the case with a voucher.

We are therefore of the opinion that it is proper for you to withhold payment on the voucher in question until such time as the parties agree or there has been an adjudication in court.

We return the notice of lien herewith for your files.

Yours truly,

LEON HORNSTEIN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Procedure to Make Street a Boulevard.

April 21, 1924.

HON. FRANK J. TOMCZAK, Alderman, 39th Ward.

Dear Sir:

You advised the Corporation Counsel that there is a movement on foot to make Addison street a boulevard, and requested this office to inform you of the proper procedure necessary to accomplish that end.

This procedure is outlined by the statute entitled, "An Act to enable park commissioners or park authorities to take, regulate, control and improve public streets, and to pay for the improvement thereof," approved June 21, 1895, in force July 1, 1895. (Chapter 105, Section 210, Cahill's Revised Statutes of 1923.) Said Act is as follows:

“210.) Section 1. *Streets taken by park commissioner, etc.* BE IT ENACTED BY THE PEOPLE OF THE STATE OF ILLINOIS, REPRESENTED IN THE GENERAL ASSEMBLY: That every board of park commissioners or park authorities shall have power to connect any public park, boulevard or driveway under its control with any part of any incorporated city, town or village (?) by selecting and taking any connecting street or streets, or parts thereof, leading to such park, boulevard or driveway, and shall also have power to accept and add to any parks or park under their control any street or parts thereof which adjoins or runs parallel with any boundary line of the same: *Provided*, that the streets so selected and taken, so far as taken, shall lie within the district or territory, the property of which shall be taxable for the maintenance of such parks, boulevard or driveway: *And, provided, further*, that the consent of the corporate authorities having control of any such street or streets so far as selected and taken, and also the consent in writing of the owners of a majority of the frontage of the lots and lands abutting on such streets, so far as taken, shall be first obtained. (J. & A., Paragraph 8085.)

211. *Special taxes—Special assessments.*) Section 2. That such board of park commissioners or park authorities shall have power to improve such street or streets, or parts thereof, in such manner as they may deem best and as they have or may hereafter have power to improve other streets under their control, and for that purpose they are hereby authorized to pay for the improvement thereof by levying, assessing and collecting a special tax on contiguous property abutting on said street or streets or parts thereof so improved, or a special assessment on property benefited, in the manner in which said board of park commissioners or park authorities are now or may be hereafter empowered by law to levy, assess and collect special taxes on contiguous property or special assessments for benefits in other cases, or to pay therefor by general taxation, or both, but no such special tax or special assessment shall be levied for the maintenance and repair of such improved street, but the same shall be maintained and repaired by said park boards or park authorities as in other cases. And such special taxes or special assessments as are hereby authorized may be divided into not exceeding ten annual installments, bearing six per cent per annum interest from the date of

confirmation thereof by the court until paid, and the same shall be collected and enforced in the same manner as is or may hereafter be provided by law for the collection and enforcement of other special taxes or special assessments for or on account of said park commissioners or park authorities, so far as the same is applicable. (J. & A., Paragraph 8086.) As amended by L. 1909, p. 297, May 25th, July 1st.

212.) Section 3. *Control by park commissioners.* Such park boards or park authorities shall have the same power and control over the streets or part of streets so selected and taken, under this Act as are now or may be hereafter vested in them, over and concerning parks, boulevards or driveways, or other streets. (J. & A., Paragraph 8087.)

213.) Section 4. *Reversion.* In case any such streets or parts thereof, shall pass from the control of any such park commissioners or park authorities, the power and authority over the same granted or authorized by this Act shall revert to the proper corporate authorities of such city, town or village respectively, as aforesaid. (J. & A., Paragraph 8088.)

214.) Section 5. *City, etc., may vest control in park commissioners.* Any incorporated city, town or village in this State shall have full power and authority to invest any of such park commissioners or park authorities with the right to control, improve and maintain any of the streets of such city, town or village, for the purpose of carrying out the provisions of this Act. (J. & A., Paragraph 8089.)

215.) Section 6. *Streets already taken included.* The provisions of this act so far as the same applies to improving, maintaining and repairing any street or streets or parts thereof, and the levy, assessment and collection of special taxes and special assessments, shall apply to any street or streets or parts thereof, that have been heretofore selected and taken under the control of any park commissioners or other park authorities, and to any such street or streets or parts thereof which, or portions of which, have not yet been improved by such park commissioners or park authorities. (J. & A., Paragraph 8090.)"

According to the provisions of the aforequoted statute, that portion of Addison street which lies within the assess-

ment district of Lincoln Park,—namely, all or any part of Addison street lying between Lincoln Park and Western avenue,—may be made a boulevard by securing the majority of frontage consents from abutting residents upon that section of the street to be taken over, by securing the consent of the City of Chicago by ordinance, and by securing the consent of the Lincoln Park Commissioners.

The consent ordinance of the City of Chicago will be drawn up for you by this department upon your request after you have received assurance that a majority of the property owners will consent to the change and after you have received an indication from the Lincoln Park Commissioners of their willingness to proceed with this project.

Very truly yours,

ALBERT H. VEEDER,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Procedure to Acquire Indemnity for the Condemnation of Tubercular Cattle Owned by the Willow Springs Farm.

April 21, 1924.

MR. RICHEY V. GRAHAM, Superintendent, House of Correction.

Dear Sir:

You have advised the Corporation Counsel that Government Inspectors have condemned eight cattle of the Willow Springs Farm as tubercular and ordered them sent to the Stock Yards to be slaughtered. You have requested us to inform you as to the procedure to be followed in order to collect indemnity for these cattle, if any should be allowed.

The cattle were condemned by the United States Department of Agriculture acting in co-operation with the De-

partment of Agriculture of the State of Illinois. The rules and regulations of the Department of Agriculture, Bureau of Animal Industry, provide for indemnity for tubercular animals condemned by the Department. Chapter 8, Sections 67 to 75 of Cahill's Revised Statutes of 1923 provides that the Department of Agriculture of the State of Illinois shall co-operate with the United States Department of Agriculture in the destruction of tubercular animals, and further provides for reimbursement to the owners of cattle so destroyed. This department has been in touch with Dr. J. J. Linter, of the Tuberculosis Eradication Division, United States Yards, who informed us that according to the ruling of the Secretary of Agriculture, the Federal Government will not pay indemnity for condemned cattle when owned by any institution supported by public taxation. We are also informed that the Department of Agriculture of the State of Illinois refuses to give compensation, in all cases where the Federal Government refuses to give compensation. In view of these rulings, the probability is that both the State of Illinois, and the United States Government will refuse to pay this claim, and should they do so, it hardly seems feasible to file suit in the court of claims of either the State of Illinois or the United States in view of the small amount involved.

We suggest that you write to Dr. J. J. Linter of the Tuberculosis Eradication Division, United States Yards, and state the nature of your claim; and we suggest that you also write the Department of Agriculture of the State of Illinois, located at Springfield, stating the nature of your claim.

In view of the aforementioned regulations, the probability is that indemnity will be refused, and for the reasons aforesaid, if it should be refused, in our opinion, it is hardly worth while to carry the matter further.

Yours very truly,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Compensation for Sub-Sidewalk Space—Issuance of Permits.

Chicago, April 23, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir :

We are in receipt of your letter concerning compensation for sub-sidewalk space which originated in your Efficiency Division. You ask whether charges for use and occupancy of such space which accrued prior to the time of taking out a permit as provided for by ordinance are collectible by law ; and you call attention to the fact that there are two classes of this kind of charges, some being based on contracts and others where there are no contracts.

We are of the opinion that these charges are collectible and that an effort should be made to clean them up.

The situation has been mixed and unsettled from every point of view for more than a dozen years, due primarily to a series of decisions which held that in the central school section there was only an easement for the benefit of the public in the streets, by virtue of a common law dedication.

In the case of *Sears v. City of Chicago*, 247 Ill. 204, our Supreme Court held that the plat of the School Section Addition was not executed in accordance with the statute and amounted only to a common law dedication ; that where the City owns the fee in a street it may allow the use of a part of the same in a manner not inconsistent with the rights of the public and charge compensation therefor ; but that where the abutting owner has the fee he may use it in that way and cannot be compelled to pay compensation.

This decision, and a number of others of similar import, rendered late in the year 1910, affected only a small portion of the contracts entered into before that time for sub-sidewalk space, but nevertheless the cry was raised that it was

a great injustice to others who were not in the school section to be compelled to pay for space which owners of ground in the school section could not be compelled to pay for. The matter was thereupon taken up by the City Council, with the result that on January 29, 1912, an ordinance was passed which was intended to adjust the entire controversy. (See Council Journal, pp. 2678-2680.)

When the ordinance thus passed is given consideration it should be remembered that there were at that time a large number of charges on the books of the City which were absolutely valid and collectible under the decision we speak of. The City Council had no legal authority to wipe them out. At the same time it manifestly intended to treat all alike so far as it could.

If these things are borne in mind, the reason for wiping out the annual compensation and substituting a permit fee becomes obvious. By the ordinance in question it was made possible for anyone who had a contract ordinance to have it cancelled, so that future compensation would not be charged thereunder, and a permit fee would be substituted therefor. But it was expressly provided that all amounts due to the City must be paid in accordance with the contract ordinance before a permit would issue.

The section of the ordinance, as amended, that bears on the question at issue reads as follows:

“2309. Whenever any party holding a contract or permit for the construction or maintenance of any space, vault or structure, under the sidewalk in any street, alley or other public place of this city, or for the construction or maintenance of any coal hole, trap-door, or other opening in the sidewalk, which shall have been issued under the terms of any ordinance or Council order heretofore in force, the conditions of which have been and are now being fully complied with, shall apply for a permit hereunder and shall desire to have the permit or contract heretofore entered into under such ordinance heretofore in force, cancelled, the Commissioner of Public Works shall cancel the same as regards any liability

thereunder arising after the date of the issuance of the new permit hereunder, but such contract or permit and the bond given therewith shall remain in full force and effect as to all rights and liabilities accruing under the same, including all amounts due the City of Chicago for fees or compensation under the same, up to the time of said cancellation, otherwise, such contracts and permits shall remain in full force and effect."

While the ordinance of January 29, 1912, was amended several times, the section quoted above has never been amended or repealed, except in so far as it was remodeled to fit into The Chicago Municipal Code of 1922, where it appears with slight modification as Section 3585.

By means of the ordinance thus passed the City Council avoided cancelling any debt due to the City, placed all on an equal footing for the future, and at the same time compelled the payment of a permit fee from those who had the right to use the streets without annual compensation the same as from those who had no such right.

There is no reason, so far as we know, for failing to enforce the provisions of the section above quoted. Some of the State street department store owners undertook to avoid payment, and the City Council thereupon consented to an arbitration, which resulted in a compromise. While the arbitrator was a judge of the Circuit Court, he did not sit as a judge in this matter. There has never been a court decision on the subject. This applies to all cases which are based on contract ordinances.

With respect to the cases where the charge is for use and occupancy but not based on a contract ordinance, we have no positive data on which to predicate an opinion as to the correctness of the charges or their collectibility, but there must have been a permit in each case which in turn is based on some order or ordinance of the City Council. As to these cases, we will be in better position to pass on the individual cases than on the general class. We recommend that you treat these cases the same as the rest, and that when objec-

tion is made on the part of the grantee it will be proper to take up the individual case and determine it.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Provision of Code Authorizing Superintendent of Police to Grant Leave of Absence with Full Pay in Certain Cases.

April 23, 1924.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

We have your communication of the 18th inst., relative to the temporary absence from your department of many policemen on sick leave, and the flagrant abuse of this prerogative which has been called to your attention by outsiders.

Upon examination of The Chicago Municipal Code of 1922 it is apparent that the policemen base their claim for compensation for such leave on Section 3105 of said Code, reading as follows:

“3105 — Furlough — Absent from duty — Salary)
* * * Any policeman absent from duty on account of sickness for a period not exceeding six months, and any policeman absent from duty on account of death in his immediate family, and any policeman temporarily absent from duty on account of sickness in his immediate family, may, *in the discretion of the superintendent of police*, receive full pay for such period of absence.”

The origin of this provision dates back to December 8, 1919, C. P. P. 1520, when the City Council passed the following amendment:

"Hereafter any patrolman absent from duty on account of sickness, for a period not exceeding six months, or temporary absence on account of sickness or death in his immediate family, which may be considered by the General Superintendent of Police a sufficient and legitimate excuse for such patrolman's failure to be present and in attendance, shall receive full pay during such absence from duty. Reasonable rules may be made by the General Superintendent of Police with reference to proof of good faith and incapacity of such patrolman. The period of such absence shall not be deducted from the furlough periods heretofore provided for."

which later was amended on March 10, 1920, C. P. P. 2192, to read:

"Any policeman absent from duty on account of sickness, for a period not exceeding six months, or temporary absence on account of sickness or death in his immediate family, which may be considered by the *Superintendent of Police* a sufficient and legitimate excuse for such policeman's failure to be present and in attendance, shall receive full pay during such absence from duty. Reasonable rules may be made by the *Superintendent of Police* with reference to proof of good faith and incapacity of such policeman; *provided, however, that the aforesaid right to receive such pay shall not exist in any case of sickness caused by any immoral practice, the use of drugs, or indulgence in alcoholic or other stimulants*; provided, further, that the period of such absence shall not be deducted from the furlough periods heretofore provided for."

and again changed on December 29, 1920, C. P. P. 1419, to conform to the language as now contained in Section 3105 as first above set forth.

You will note that it is within your discretionary power as Superintendent of Police to allow or not to allow full pay to any absentee, but the wording of this section is ambiguous in the sense that the designated period of temporary absence

from duty of "not exceeding six months" does not definitely state the manner of calculation, and under such wording one could read a sick period of six months; a return to work for a week or two, and back on sick leave for another long stretch—it might be construed to mean six months in one calendar year, and in that event one continuous leave could extend further than six months by bridging say, five months in one calendar year and commencing a new period limited to six months in the new year; or it may be construed to mean six months from the beginning of and within a "sick" year.

No given period being mentioned within which the City Council intended a sick leave to be a part, it is therefore left to the further discretion of the Superintendent of Police.

Since the inauguration of this provision, the City Council has, by amendment, endeavored to restrict the abuse practiced by limiting the nature of the illness on account of which recovery might be had. The restrictions imposed by such amendment apparently proved ineffectual, and under the ordinance in its present form, the latitude allowed is so great that aside from the financial drain, it can seriously hamper your man-power.

The Fire Department did not fare so well with the makers of the code for while under Section 1199 any member thereof may recover full salary over a period of one year, there is a most important reservation, it being a limitation regarding such recovery, to one "receiving any injury or becoming disabled *while in the discharge of his duties.*" This precludes any attempt to obtain salary for any length of time under the pretext of "sickness in his immediate family" which is now restricted to the police employes.

By way of further comparison: All other municipal employes receive fifteen days' sick leave.

With regard to the Policemen's Annuity and Benefit Fund, it provides in Section 46, Cahill's 1923 Statutes, Par. 897, that

"Benefit to be known as 'Ordinary Disability Benefit' shall be provided for policemen in the service who

shall become disabled as a result of *any cause* other than injury incurred in the performance of an act or acts of duty. * * *

Section 12 of said act defines the word "Disability" as "a condition of physical or mental incapacity on the part of a policeman to perform the duties of his position in the service" so that when a policeman reaches a condition either physical or mental, where he is incapable of performing his duties in the service he is entitled to ordinary disability benefits.

In our opinion there is no valid reason why the code should carry diversified "sick" periods for individual branches of the service and it would be well for the Council to provide a uniform system, except in instances where disability occurs in line of duty.

In the interim, you are privileged whenever the exigencies of the department so require, to disallow the payment of salaries to members of the police force remaining away from duty for causes not directly attributable to police work.

Yours very truly,

JAY A. SCHILLER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Whether the City of Chicago or the Lincoln Park
Board Has Jurisdiction of the Foot of Bryn
Mawr Avenue and the Lake East of
the Retaining Wall.**

April 24, 1924.

HON. E. I. FRANKHAUSER, Council Chambers.

Dear Sir:

We have your request desiring to know who has control, the City of Chicago or the Lincoln Park Board, of the sand

or beach or land lying and being east of the retaining wall at the foot of Bryn Mawr avenue. It would seem that during the bathing season, parties have erected stands (fruit stands) on the aforementioned premises. These stands have been there without any permit from either the Lincoln Park Board or the City.

You state in your communication that the retaining walls immediately north and south of Bryn Mawr avenue are the west lines of Lincoln Park. These walls have been erected under agreement with the Lincoln Park Board and the riparian land owners next adjoining by trading their riparian rights for a shore line.

A retaining wall connects the wall on the north side and the wall on the south side of Bryn Mawr avenue and now is the east end or foot of Bryn Mawr avenue.

In order to determine who has jurisdiction of the premises above mentioned, it will be necessary to examine the statutes which gave to the Lincoln Park Board, the right and authority to extend the park district up to and beyond the premises in question.

The statute from which the Lincoln Park Commissioners derive their power to construct the boulevard system was passed in 1895, and provides substantially that when the Park Commissioners shall decide to extend a boulevard on public waters over the bed of such waters, said board shall adopt a plan of such enlargement and shall locate a boulevard or driveway upon and over the bed of such public waters; that they may proceed to acquire the riparian rights of the owners of land adjoining said proposed boulevard or park system by agreeing with said owners, that, in return for the surrender of their riparian rights, they shall be given title in fee simple to such part of the submerged land lying between the proposed boulevard and the original shore line as may be agreed upon with such owners. The statute further provides that in case the Park Commissioners cannot agree with the riparian owners for the surrender of their riparian rights, the Park Board may condemn such riparian rights.

In order to have the matter more clearly before us, we are citing such part of the statute as we think is relative to a clear understanding of the matter as appears in Smith-Hurd Illinois Revised Statutes—1923, page 1447, Sections 79 and 80.

“79. Reclaiming submerged lands—Plans—Title to lands.) Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That in all cases where lands within specified boundaries bordering on public waters in this state have been declared to be a public park, and where the commissioners of such park have been named in the act establishing the same, and their successors have since been appointed by the Governor of this state, the said commissioners of any such park shall have power from time to time in their discretion to enlarge the same by reclaiming submerged lands under said public waters in the following manner: Said board of commissioners upon deciding to make any such enlargement of said park shall prepare and adopt a plan of such enlargement and in the same shall locate a boulevard or driveway over and upon the bed of such public waters. The termini of such boulevard or driveway shall be within the district or territory the property of which shall be taxable for the maintenance of the park under the control of said board, and one at least of such termini shall be at or upon some driveway or boulevard already established and under the control of said board of commissioners. The said proposed boulevard or driveway shall be so located as not to interfere with the navigation of such public waters for the purposes of commerce. Said plan shall provide for such breakwater, sea-wall or other protection upon the water line of said boulevard or driveway as shall be necessary to save the same from destruction or waste by water.

Said plan shall also locate upon the submerged lands between the shore line of such public waters as it exists at the time said plan is prepared and adopted and the inner line of the proposed boulevard and driveway, such portions of the submerged lands to hold, use and improve for the purposes of a public park under its control and management. Said board of commissioners after the preparation and adoption of said plan shall make an estimate of the cost of the construction of said boulevard and driveway and the filling in and

reclamation of all the submerged lands lying between the inner line of said boulevard and the shore line of such public waters. Thereupon the title of such submerged lands over which the said boulevard or driveway is located and of the said submerged lands between said boulevard as located and the shore line shall become and be vested in and is hereby granted to the said board of commissioners, in fee simple for park purposes, as hereafter in this act set forth."

"80. Riparian rights.) Section 2. The riparian rights of the owners of lands along the shore adjoining such submerged land, and such land along the said shore as to the said board shall seem necessary and desirable, the said board of commissioners may acquire by contract with or deeds from any such owner, and in case of inability to agree with any such owner proceedings may be had to condemn such rights and such lands according to the provisions of Article 9 of an act entitled, 'An Act to provide for the incorporation of cities and villages' (approved April 10, 1872), and the amendments thereof.
* * *"

The constitutionality of the above act has been sustained by the Supreme Court in the case of *Commissioners of Lincoln Park v. Fahrney*, 250 Ill. 256, where it was directly attacked.

The Park Board has perfected a plan as authorized by the statute above quoted.

That the Supreme Court recognizes this plan can be seen from page 261 of the case cited *supra* as follows:

"The court found and decreed that the Act of 1895 and subsequent acts were constitutional, and that by compliance with the provisions of the Act of 1895 by the park commissioners the title to the submerged lands lying between the north line of Grace street extended and Devon avenue (between which points appellee's lots are situated) became vested in the commissioners of Lincoln Park in fee simple, for park purposes. * * *"

Bryn Mawr avenue lies between Grace street and Devon avenue in the strip above described by the Supreme Court, and lies opposite to the extension of Lincoln Park as planned. As you have indicated in your communication, and as veri-

fied by the attorney for the Lincoln Park Board, the retaining wall referred to in the caption is the west edge of Lincoln Park as extended. Therefore, the land and sand beaches above referred to, being east of the west line of Lincoln Park, vests in fee simple for park purposes, in the Commissioners of Lincoln Park, and is entirely within the territorial limits of Lincoln Park.

In order to show that the Park Board has power and control over acquired lands, we quote from Smith-Hurd Illinois Revised Statutes—1923, page 1485, Section 270, as follows:

“270. Acquisition of land.) Section 15. Said park district shall have the power to acquire by gift, grant or purchase, or by condemnation under the act of eminent domain, any and all real estate, lands, riparian estates or rights, and all other property required or needed for any such park or boulevard, or for extending, adorning or maintaining same, whether such land be located within or without such district, if such land is deemed necessary for park purposes or for boulevards or driveways; provided, however, that neither said park district, nor the park board thereof, shall have any power whatsoever of condemnation under the eminent domain act, or otherwise as to any real estate, lands, riparian rights or estates, or other property being or situated or located outside of such park district, but shall only have power to acquire same by gift, grant or purchase. The park commissioners shall have the same control of and power over lands so acquired without the park district as over parks, boulevards and driveways within such park district. * * *

The last sentence above quoted will show that the power, control, and jurisdiction of the land and sand beach east of the retaining wall at the foot of Bryn Mawr avenue vests exclusively in the Commissioners of the Lincoln Park Board.

Yours very truly,

FRANK T. HUENING,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Disposal of Sum of Money Found by Civilian and Turned Over to the Police Custodian.

April 24, 1924.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir :

In accordance with your request of April 18, 1924, as to the disposition of a sum of money found by a civilian and turned over to the 23d District Station, and now in the possession of the City Custodian, we submit herewith our opinion as to the law governing "lost property."

By general rule of the common law, one who finds and appropriates a lost chattel acquires the title thereto and the right of possession thereof against all the world except the true owner.

25 Corpus Juris, page 1136.

Our State Statute, Chapter 50, Paragraphs 27 and 28, governing "lost property," is as follows:

"If any person or persons shall hereafter find any lost goods, money, bank account * * * of the value of \$5 and upwards, it shall be the duty of such person or persons to inform the owner thereof, if known, and to make restitution of the same without any compensation whatever, except the same shall be voluntarily given on the part of the owner; but if the owner shall be unknown, such person or persons shall, within five days after such finding as aforesaid, take such goods, money, bank notes * * * before some justice of the peace of the proper county, and make affidavit of the description thereof, the time and place when and where same was found, that no alteration has been made in the appearance thereof since the finding of same, whereupon the justice shall enter a description of the property thus found and the value thereof as near as he can ascertain, in his estray book, together with the affidavit of the finder, to be taken as aforesaid; and shall also, within ten days after the said proceedings shall have been entered on his estray book as aforesaid, transmit to the county clerk a certified copy thereof, to be by him recorded in his estray book, and to file the same in his office."

Paragraph 28 provides:

"* * * shall not exceed the sum of \$15 * * * but if the value thereof shall exceed the sum of \$15, it shall be the duty of the county clerk, within twenty days from the time of the reception of the justice's said certificate at his office, to cause an advertisement to be set up on the court house door, and in three other of the most public places in the county and also a notice thereof to be published for three weeks successively in some public newspaper printed in this State; and if the said goods, money, bank notes, or other choses in action, be not reclaimed within six months after the advertisement thereof as aforesaid, it shall be the duty of the finder * * * to deliver same to the county treasurer after deducting the necessary expenses hereinafter provided for; * * * the proceeds of all such sales, after deducting the costs and other expenses, shall be paid into the county treasury."

Paragraph 30 provides:

"All costs of proceedings in the matter of an estray or other property taken up or property found, shall be paid by the taker-up or finder in the first instance and if he is not repaid by the owner of the property, such costs shall be refunded to him out of the proceeds of the sale of such property."

Chapter 37, Paragraph 390, Sub-paragraph 4 (e) provides that the Municipal Court of Chicago has jurisdiction in all actions and proceedings of which justices of the peace are now given jurisdiction by law.

As between the right of the police custodian to retain the money and the finder to secure its return the latter's is superior and if so requested the money should be returned to her and she should be advised as to the law above quoted so that she may proceed accordingly.

Yours very truly,

LAWRENCE J. FENLON,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Compensation for Maintenance of Tunnel Under Street
When City Does Not Own Fee.**

May 1, 1924.

HON. JAMES B. BOWLER, Commissioner of Compensation.

Dear Sir :

You have transmitted to the office of the Corporation Counsel certain correspondence in regard to the maintaining of a tunnel under Surf street and have requested this office for an opinion relative to the right of the City to require compensation therefor.

The question of whether the City has any right to require compensation for the use of space under the streets and alleys, assuming that the use of the space does not interfere with the use of the street, depends on whether the City owns the fee in the street or whether it is merely an easement of the right to use the surface as a street. When streets and alleys are dedicated to the City by a plat which conforms to the statute, the fee is vested in the City and the space below the street is owned by the City and any person who desires to use the land under the street must obtain permission from the City, and pay a compensation therefor, if the City so requires. On the other hand, if a plat is filed dedicating streets to the City which does not properly comply with the statute, our Supreme Court has held that the City acquires only an easement to use the surface of the street for purposes of travel, and that the land beneath the street belongs to the abutting owner. (*Sears v. City of Chicago*, 247 Ill. 204.)

In order to ascertain whether the land at 550 Surf street was dedicated to the City of Chicago by a statutory or common law dedication, we have examined the abstract and find the following:

The street was originally laid out by the Highway Commissioners, Document No. 5525026, appearing of record in

the recorder's office of Cook County in Book 11951, page 614. LeMoynes subdivision was made in 1869 and recorded June 29, 1869, in Book 170 of Maps, page 15, Document No. 17430. Said map, as shown in the abstract of title to Lots 13, 14, 15 and 16 in Block 1 in Gilbert Hubbard's addition to Chicago; also Lots 14, 15 and 16 in Block 3 in LeMoynes subdivision in Section 28, 40, 14, Cook County, Illinois, prepared by Chicago Title & Trust Company, does not comply with the statute in that there is no acknowledgment by the owner or by the surveyor on the margin of the plat nor is there any cornerstone or permanent monument. The Supreme Court of Illinois has held that when the plat is not personally acknowledged by each of the proprietors in accordance with the statute, there is not a good statutory dedication. (*City of Alton v. Fishback*, 181 Ill. 396; *Earll v. City of Chicago*, 136 Ill. 277; *Gosselin v. City of Chicago*, 103, 623.)

Gilbert Hubbard's addition made in 1870, is shown in Book 172 of Maps, page 65, Document 74453. Said map is also defective for the foregoing reasons.

In conclusion, therefore, this office is of the opinion that the dedication aforesaid was a common law dedication. Therefore the City of Chicago does not own the fee in the land underlying Surf street at this particular point. That being the case, the City has no right to require compensation for the maintenance of a tunnel under Surf street between the Commodore and Green Briar apartments.

All correspondence concerning this matter which you have transmitted to this office is herewith returned.

Yours truly,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Use of Vehicle Tax Fund for Widening of a Street.

May 1, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

You have requested the Corporation Counsel for an opinion with regard to the legal right of the City to make use of the vehicle tax funds for the widening of North Clark street.

The City is given the right and authority to collect a vehicle tax by Clause 96 of Section 1, Article V of the Cities and Villages Act, which reads as follows:

“96. To direct, license and control all wagons and other vehicles conveying loads within the City, or any particular class of such wagons, and other vehicles, and prescribe the width and tire of the same, the license fee when collected to be kept as a separate fund and used only for paying the costs and expenses of street or alley improvement or repair.”

Pursuant to the authority granted by the statute aforesaid the City of Chicago has passed ordinances requiring all motor vehicles operated by City residents within the City to be taxed. The ordinance further provides that the proceeds from said fund shall be disbursed in the following manner:

“4071. *Application of revenue.*) All revenues derived from such license and transfer fees shall be kept as a separate fund and used for paying the cost of street and alley improvement and repair.

The city collector shall keep a separate account by wards showing the amount of revenue obtained from each ward in which any vehicle not drawn by animal power is kept when not in use, and in which any animal or animals are kept drawing any wagon or vehicle for which a license is procured under the provisions of this article.

Fifteen per cent of the total revenues thus obtained shall be set aside, to be expended in the discretion of the commissioner of public works and under his direction, for the repair of such streets upon which there is an unusually heavy amount of traffic.

So much of the remaining eighty-five per cent of the revenues obtained from each ward, as, in the discretion of the commissioner of public works, may be needed for immediate use, shall be expended under the direction of said commissioner for the repair of streets and alleys in such ward, and the balance thereof shall remain to the credit of such ward account to be used as occasion requires."

It should be noted that the statute provides that the proceeds of the fund shall be used for street *improvement and repair*.

The aforementioned Section 4071 of the Code provides in the first paragraph that the revenue derived from the license and transfer fees shall be used for paying the cost of street and alley *improvement and repair*. While it is true that the last paragraph in the said Section 4071 refers only to the *repair* of streets and alleys, we are nevertheless of the opinion that since the ordinance should be construed as a whole and in view of the maxim *noscitur a sociis*,—a word is known by the company it keeps,—the word "repair" as used in the last paragraph should be construed to mean repair and improvement.

If the widening of North Clark street can be considered, in law, an improvement of North Clark street, then, we see no legal objection to using the funds for that purpose. The term "street improvement" has been frequently construed to mean a change or addition to the street. In the case of *City of Cincinnati v. Batsche*, 40 N. E. 21, 24, it was held that the statutes authorizing assessments for local "improvement," etc., have reference to the specific thing of definite location which is done or added to the street whereby it is improved. See also *Putman County Commissioners v. Young*, 36 Ohio State, 288, 292, and *Cook v. Borough of Chambersberg*, 39 N. J. L. 257, 259.

In conclusion, therefore, we are of the opinion that since the proposed widening of Clark street does not contemplate the changing of the course of the street or laying out a new street and since it may properly be considered an "improvement" of the street, there is no legal objection to using the funds of the vehicle tax for that purpose.

While there is no legal objection to this use of the fund, we desire to call to your attention, the fact that under the aforementioned Section 4071 of the City Code, discretion in using the fund for any of the purposes therein mentioned is vested in the Commissioner of Public Works. Whether or not it is wise to use the fund for the purpose of widening Clark street, instead of for other purposes allowed by the ordinance, must be determined by the Commissioner of Public Works as a matter of policy.

Yours very truly,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Damage to City Vehicles by Negligent Drivers of Other Vehicles.

May 3, 1924.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

You have advised the Corporation Counsel that John E. Ptacek, Deputy Superintendent of Police, has requested an opinion with regard to the question of who would be liable for claims or suits for damage to police automobiles or other vehicles, by autos or other vehicles driven by persons other than the owner or employe thereof, where the driver of the latter is to blame for the accident. Replying thereto, we beg to inform you as follows:

The City of Chicago may file suit in its own name for damage to police patrols or other vehicles owned by it resulting from the negligent act of the driver of another vehicle. In such a case, the person driving the other vehicle, and who is directly to blame for the accident, is the person liable. The fact that the driver of the other vehicle is not the owner of the vehicle, makes no difference. If he had control of the vehicle at the time of the accident, and if the collision was caused by his negligent driving, and if there is no contributory negligence on the part of the driver of the City vehicle, then the person driving the private vehicle is liable.

The owner of the private vehicle is not liable unless the person driving the vehicle is his agent or employe and engaged in carrying on his business at the time of the accident. This rule applies to the case of minors as well as to agents and employes generally. A parent who owns a vehicle is not liable for the negligent driving of his minor son unless, at the time of the accident, the son was using the vehicle with the knowledge and consent of the parent and was engaged in the parent's business. (*Kitchen v. Weatherby*, 205 Ill. App. 10, 11; *Arkin v. Page*, 287 Ill. 420-23.)

Very truly yours,

ALBERT H. VEEDER,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

City May Not Give Away Valuable Contract Right Without Receiving Consideration.

May 5, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

By communication to this office, of April 29th, you expressed a desire to modify the present contract between George B. Levee, the restaurant concessionaire on the Mu-

municipal Pier, and the City of Chicago. Under the present contract, the said Levee is awarded a catering concession on the pier for the years 1923 to 1927, inclusive, and by the terms of said contract he is required to pay to the City of Chicago the amount of $28\frac{1}{4}$ per cent of the gross receipts from the concession. You state that the fact that the concessionaire is required to pay so large a percentage of the gross receipts to the City, results in high prices of foods and beverages upon the pier, and that if this contract can be modified in such a way as to reduce the amount of the gross receipts to be paid to the City, that then the people patronizing the restaurant on the pier may obtain lower prices. The reduction which you have suggested is as follows:

On Foodstuffs, Confectionery and Tobacco from $28\frac{1}{4}$ per cent, reduced to 5 per cent;

On Soft Drinks, from $28\frac{1}{4}$ per cent, reduced to 10 per cent;

On all other concessions, $28\frac{1}{4}$ per cent as before.

You have attached a letter to your communication sent you by George B. Levee on March 31, 1924, in which he stated that his payments to the City of Chicago for the season of 1923 amounted to forty-seven thousand six hundred and sixty-two (\$47,662) dollars. The reduction which you have suggested would amount to a very large diminution of this payment. The percentage, for example, on foodstuffs alone, is reduced from $28\frac{1}{4}$ to 5 per cent. The chances are that the income to the City would be reduced from \$47,000 to somewhere in the neighborhood of \$5,000 or \$10,000.

For the following reasons we believe that the City of Chicago has no right, power or authority to alter the present terms of this contract.

It has been held repeatedly by the Supreme and Appellate Courts of Illinois that, although the City has the power to settle a doubtful claim or dispute, nevertheless, it can not give away, without consideration, any valid contract right or chose in action. The present contract is not a doubtful claim. It is a definite liquidated contract right, which can

not be given away by the City without adequate consideration. If the City rescinds this contract and enters into a new contract, or if it accomplishes the same end by modifying the present contract, in such a way that the amount which the City is to receive is materially reduced, and if the City receives no consideration for this reduction, then it is violating the aforementioned proposition of law. In the case of *Ludlow Valve Mfg. Co. v. City of Chicago*, 181 Ill. App. 388, the court, at page 394, said:

“As to the second question involved, ‘it is a plain proposition of law, and one well understood, that in the discharge of their duties a city council must act within the bounds prescribed by their charter, and if they exceed the powers conferred by the charter, such acts are nugatory. They have no power to squander or give away the funds or property of the incorporation, but all property within their control, belonging to the incorporation, must be honestly applied to the uses and purposes specified in the act of incorporation. The city council have no power to sell, or in any manner dispose of, the property of the corporation without consideration, and, in our opinion, they have no right to discharge a debt without payment, which may be held against parties who are solvent and responsible, where no controversy exists in regard to the validity and binding effect of the indebtedness.’ *Agnew v. Brall*, 124 Ill. 312. See also to the same effect, *Town of Petersburg v. Mappin*, 14 Ill. 193, and *City of Chicago v. Pittsburg, C. C. & St. L. Ry. Co.*, 244 Ill. 220.”

See also *Sherlock v. Village of Winnetka*, 59 Ill. 389, 398; *Agnew et al. v. Brall*, 124 Ill. 312; *Sackett v. City of Morris*, 149 Ill. App. 152.

In the instant case, there is no consideration for the reduction of the terms of the contract to George B. Levee. The City of Chicago would be giving up a part of its income derived from payments under this contract and would not be receiving any consideration therefor. The fact that the public generally would derive a consideration in lower prices, is not a consideration which runs to the City of Chicago as a corporate entity, and therefore may not be considered.

In conclusion, therefore, we are of the opinion that the City of Chicago has no authority to modify or alter the terms of the present contract along the lines you have indicated.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Provisions of Law Relative to the County Collector
Turning Over to the City All Moneys Due
the City from Taxes—Failure to
Comply—Penalty.**

May 5, 1924.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

You forwarded to us draft of an order presented by Alderman Charles S. Eaton and referred to your committee, which directs the Corporation Counsel to "take immediate steps to force the County Collector to promptly account for, and to pay over monthly, all moneys due to the City from taxes." You have asked us to give your committee the benefit of our ideas in this matter. While this request is somewhat vague we take it that you desire us to state the law on the subject.

The law provides that the books prepared by the County Clerk, each of which contains a warrant for the collection of the taxes therein extended, shall be turned over to the town collectors on or before the 21st day of December. (Revenue Act of 1872, Sec. 135.) There are some exceptions to this, such as the books containing taxes against railroad property,

capital stock of telegraph companies, etc., which are turned in directly to the County Collector. In this city, however, the County Treasurer, who is *ex officio* County Collector, in turn as *ex officio* County Collector becomes *ex officio* Town Collector for almost the whole of the city. That is to say, he is *ex officio* town collector for the Town of South Chicago, Village of Hyde Park, Town of Lake, Town of West Chicago, Town of North Chicago, Town of Lake View, Village of Rogers Park and Town of Jefferson. This so nearly covers the entire city that for practical purposes it may be said that the City's tax books are turned over to the County Collector, as *ex officio* town collector of the various towns, in the first instance.

As *ex officio* Town Collector the County Collector is required by law to make final settlement of all taxes collected on or before the tenth day of March within twenty days thereafter. (Act of 1872, Sec. 169.) By this means there is a final accounting provided for as to all moneys collected in his capacity as Town Collector. Prior to that date the law requires a settlement every 30 days directly with the City. (Sec. 164.) There is not, in our opinion, any ground for assuming that the final settlement of the Town Collectors provided for by Section 169 contemplates the turning over of the City's money to the County Collector, but since the Town Collectors and the County Collector are the same person, there would be no object in delving into this question. We only mention it because in any event there should be a final settlement with the City for all moneys collected as Town Collector before April first of each year.

For such collections as the County Collector makes on or before the tenth of March in his capacity as County Collector he must make an accounting at the same time as he accounts for what he receives from himself and others as Town Collectors. (Act of 1872, Sec. 239.) A sworn statement of same must be filed with the County Clerk and the County Clerk thereupon must immediately certify to the proper authority of the City the amount for which the collector is required to settle with the City (Sec. 240). Such

certification must also be made to the State Auditor and to the other taxing authorities. Under Section 241 the County Collector is required to turn over to the State Treasurer, on or before April 15th, the taxes shown by the statement as due to the State.

The law contemplates that after the County Collector takes over the books he should make full settlement on the first of each month, beginning with the first of April. This is provided for by an amended Section 243 of the Revenue Act of 1872 which was passed in 1917 at the request of certain civic organizations that were sponsors for it when it was before the Legislature. Prior to that time there was more or less confusion as to the exact time of settlements which we will not discuss at length. For the purpose of indicating the true meaning and import of the new section, however, we find it necessary to comment on the old section which has been repealed by the amendment, and the two sections following immediately thereafter which have not been expressly repealed.

Under Section 243 as it stood prior to 1917 the County Collector was required to pay over to the local authorities the amounts shown due to them at the same time that he made the payment to the State Treasurer. This related only to the statement made on or before the tenth of April. Subsequent payments were provided for under Section 244, which has not been repealed or amended, and which still contains the requirement that the County Collector shall report and pay over to the City the amount of taxes and special assessments collected by him "at least once in every ten days, when demanded by the proper authorities or persons." Section 245, which also stands as it did before 1917, provides for the bringing of suit upon the Collector's bond for failure to make reports and payments for five days after demand is made. Section 246 provides that if any County Collector fails to account and pay over "as required in the preceding sections," his office may be declared vacant by the county board, or by any court in which suit is brought on his official bond.

Under the rule that where a later statute conflicts with a former one, such parts of the former statute as are in direct conflict therewith are repealed by implication, Section 244 is repealed practically for all purposes, and there are some things in Section 245 which are no longer in effect. There is some doubt as to whether the ten day provision in Section 244 is still in effect in respect to special assessments, but we believe that such special assessments stand on the same footing as taxes.

Section 243, as amended in 1917, reads as follows:

“Section 243. The county collector shall on the first day of April and the first day of each and every month thereafter, pay over to the other proper authorities or persons the amounts in his hands and payable to them as taxes, not theretofore paid over: *Provided*, that in counties under township organization, where no town collectors are elected, no fees or commissions shall be deducted by the county collector from taxes collected by him and heretofore authorized to be collected by town collectors, and all such taxes collected shall be paid over in full to the proper authorities or persons authorized by law to receive the same.

Any county collector who shall fail to pay over the amount of taxes due and payable, at the time or times required by this section, shall be subject as a penalty for such failure to pay a sum of money equal to the interest on such amount at the rate of one-tenth of one (1) per cent per day from the time such amount becomes due and payable until the same is paid; and the sureties upon the official bond of such collector shall be liable for the payment of such penalty. The penalty in this section provided may be recovered in an action of debt against such collector and his sureties aforesaid, in the name of the people of the State of Illinois, in any court of competent jurisdiction, and the amount of the penalty, when recovered, shall be paid into the county treasury: *Provided, however*, that this section shall not invalidate or increase the liability upon the bond of any county collector in force prior to the passage of this act, and that to such extent as its application to any such existing bond would result in invalidating or increasing the liability thereon, this section shall be inapplicable thereto.”

From the above it will be seen that the law, as it now stands, requires the County Collector to make a settlement of all taxes collected by him as *ex officio* town collector before April first, that he is further required to make settlement for all taxes which he has collected as County Collector on April first, and that thereafter he is to pay over on the first of each month all taxes and special assessments collected by him which have not been previously paid over. Failure to pay over at the time required by statute subjects the County Collector to a penalty of one-tenth of one per cent a day on the amount withheld, and his sureties are liable therefor. The provisions concerning the bringing of a suit by any taxing authority affected and the vacation of his office on account of such failure to pay also remain in force.

We return herewith draft of proposed council order which forms a part of your files.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Temporary Obstruction of Streets by Building Material When Erecting Building.

May 6, 1924.

HON. FRANK J. TOMCZAK, Alderman, 39th Ward.

Dear Sir:

We have your letter of April 30th, wherein you request us to draw up an ordinance, if enforceable, which would make it unlawful for anyone temporarily to use a street for construction materials during the erection of buildings.

The Chicago Municipal Code of 1922 has contained within its general ordinances in the chapter on Buildings the following sections directly applicable to the proposition you raise, viz.:

820. Sidewalk and street—occupation of—limitations.) (a) The extent of occupation of sidewalk and street to be covered by the terms of a permit for street obstruction or building shall be as follows:

(b) Such permit shall not authorize the occupation of any sidewalk or street or part thereof other than that immediately in front of the lot or lots upon which any building is in process of erection and in relation to which such permit is issued.

(c) During the progress of building operations, a sidewalk not less than six feet in width shall be at all times kept open and unobstructed for the purpose of passage in front of such lot or lots. Such sidewalk shall, if there are excavations on either side of the same, be protected by substantial railings which shall be built and maintained thereon so long as excavations continue to exist. It is not intended hereby to prohibit the maintenance of a driveway for the delivery of material across such sidewalk from the curb line to the building site.

821. Sidewalks—delivery of material—elevated sidewalks.) It shall be permitted for the purposes of delivering material to the basements of buildings in process of erection to erect elevated temporary sidewalks to a height of not exceeding four feet above the curb level of the street, and in case a sidewalk is so elevated it shall be provided with good, substantial steps or easy inclines on both ends of the same and shall have railings on both sides thereof.

822. Temporary roof over sidewalks—time maintained.) When buildings are erected of a height greater than four stories and such buildings are near the street line, there shall be built over the adjoining sidewalk a roof having a framework composed of supports and stringers of three-inch by twelve-inch timbers not more than four feet from center to center, covered by two layers of two-inch plank. When additional stories are added to an existing building and such building is located near the street line, there shall be built over the sidewalk, at the point where the new stories commence, a scaffold not less than six feet wide, which shall form a covering over the sidewalk composed of a framework

of stringers and supports, covered with two layers of two-inch planks. Such framework and covering shall be of such construction and design as shall be satisfactory to the commissioner of buildings. Such roof shall be maintained as long as material is being used or handled on such street front above the level of the sidewalk. Temporary sidewalks, their railings, approaches and roofs over same, shall be made with regard to ease of approach, strength, and safety, to the satisfaction of the commissioner of buildings.

823. Storage of building materials—limitations.) The occupation of the street for the storage of building material for any one building or for temporary sidewalks, shall never exceed one-third of the width of the roadway of the same, and in no event shall any material be stored or placed within four feet of any steam or street railway track, and in all cases where such obstruction of the street is made there shall be a clear space of not less than one foot between such obstruction and the curb line; provided, that the commissioner of buildings and the commissioner of public works, or either of them, may limit or entirely restrict, the storage of material on any street or alley where a tunnel, conduit, or any underground passageway or subway is located.

824. Sidewalks and street—excavated material and rubbish on—how cared for.) Earth, other than sand to be used in the construction of the building, taken from excavations, and rubbish taken from buildings shall not be stored either upon the sidewalks or roadways of streets, and shall be removed therefrom from day to day as rapidly as produced. When dry rubbish is being handled, it shall be kept wetted down so as to prevent its being blown about by the wind.

825. Use of derricks.) For all buildings more than four stories in height the use of derricks set upon the sidewalk or street is prohibited. In no case shall the guy lines be less than fifteen feet above the roadbed.

826. Frontage adjacent—how occupied for building purposes.) If the written consent of and a waiver of claims for damages against the city by the owners of properties adjoining the site of any proposed building is first obtained and filed with the commissioner of public works, the permission to occupy the roadway and the sidewalk may be extended beyond the limits of such building in front of the property for which the consent of the owner or lessee thereof has been secured upon the

same terms and conditions as those herein fixed for the occupation of sidewalk and street in front of the building site.

827. Street—use of for building purposes—when terminated—red lights.) (a) The permission to occupy streets and sidewalks for the purposes of building is intended only for use in connection with the actual erection, repair, alteration or removal of buildings, and shall terminate with the completion of such operation. It shall be unlawful to occupy any sidewalk or street after the completion of the operation for which a permit has been issued by the department of buildings. It shall also be unlawful to occupy a sidewalk or street, under authority of such permit, for the storage of articles not intended for immediate use in connection with the operations for which such permit has been issued.

(b) Red lanterns shall be displayed and maintained during the whole of every night at each end of every pile of material in any street or alley and at each end of every excavation.

828. Street obstructions—permits — bonds — fees.) (a) Permits for the obstruction of streets shall be issued by the commissioner of public works and shall be paid in proportion to the street frontage occupied at the rate of five dollars per month for every twenty-five feet, or fractional part thereof, of frontage so occupied; and before any permit shall be granted to any person, firm or corporation for the obstruction of any street or streets or sidewalk, an estimate of the cost of restoring said street and sidewalk to a condition equally as good as before it shall have been obstructed, with a fair additional margin for contingent damages, shall be made by the commissioner of public works. Such estimate shall in no case be less than two dollars per foot, or fractional part thereof, for the frontage of the portion of the street to be obstructed, and a deposit shall be required of the person, firm or corporation desiring to obstruct such street or sidewalk. Such deposit, less the charge of five dollars per month for each twenty-five feet of frontage used, shall be returned upon the restoration of the said street and sidewalk to a condition equally as good as before it was obstructed. When the commissioner of public works shall receive satisfactory proof that said street and sidewalk have been restored to a condition equally as good as before it was obstructed, he shall issue a certificate to the comptroller certifying to said fact,

and the comptroller shall thereupon forthwith issue a warrant on the city treasurer for the amount of money thus deposited, less the deduction herein provided for. But if the person, firm or corporation thus obstructing said street or sidewalk shall fail to restore the same to a condition equally as good as before it was obstructed within three days from and after the completion of the building or structure for which said deposit was required, then the city shall have the right to use such portion of said deposit as may be necessary to remove the obstructions and to restore the said street and sidewalk to a condition equally as good as it was before it was obstructed, and the amount thus expended shall be deducted from the amount of said deposit; provided, however, that nothing herein contained shall preclude the city from maintaining any action against the person, firm or corporation to recover for damage done to any street or sidewalk. No permit shall be issued until the applicant therefor shall have executed and filed with the commissioner of public works a bond, with sureties to be approved by said commissioner, and in an amount to be designated by him, in no case to be less than ten thousand dollars, conditioned to indemnify, save and keep harmless the city from any and all loss, cost, expense or liability of any kind whatsoever which it, the city, may suffer or be put to, or which may be recovered from it from or by reason of the issuance of such permit, or by reason of any act or thing done or neglected to be done under or by virtue of the authority given in such permit and the requirements of the city ordinances.

(b) Any permit issued pursuant to the terms of this section may be revoked by the commissioner of public works at any time.

It is a well known principle of law that municipal authorities have only such powers as are granted to them by the legislature. The ninth clause of Paragraph 65 of Article V of Chapter 24 (Cities and Villages Act), Cahill's Rev. Stat. 1923, gives power to the City Council "To regulate the use of same" (streets).

Our Supreme Court has held that the control of the city over streets within corporate limits is absolute. *City of Pana v. Boren*, 77 Ill. 408.

The City Council, having power to regulate, must exercise the same by ordinance which has been done in so far as allowing use thereof for building material purposes, by adopting Code Sections 820 to 828, inclusive.

In the case of *Tolman & Co. v. City of Chicago*, 240 Ill. 268, 275, the court said:

“Placing building materials in the street preparatory to building on the land is not unlawful if the street is not improperly obstructed and the materials are removed within a reasonable time.”

Van O’Linda v. Lathrop, 21 Pick. 292.

Mallory v. Griffey, 85 Pa. 275.

Hundhauser v. Bard, 36 Wis. 29.

Raymond v. Kiseberg, 84 Id. 302.

King v. Ward, 4 A. & E. 405.

Rex v. Jones, 3 Camp. 230.

The court further said in quoting from *Commonwealth v. Passmore*, 1 Serg. & R. 217:

“It is true that necessity justifies actions which would otherwise be nuisances. It is true, also, that this necessity need not be absolute—it is enough if it be reasonable. So, because building is necessary, stones, bricks, lime, sand and other materials may be placed in the street, provided it be done in a most convenient manner.”

The City Council has passed an ordinance fully setting out the conditions under which permits will issue to contractors for the use of street space and if it is your judgment that the Council now wishes to terminate such privileges, the procedure would be to repeal the present ordinance and pass a prohibitory ordinance in place thereof.

In view, however, of the many decisions of the courts cited above validating similar ordinances elsewhere as a necessary and reasonable exercise of power, we are of the opinion that where necessity requires the public use of the street to be subjected to such incidental and partial obstructions as set forth in your communication, the strict enforce-

ment of the law would be more apt to serve the purpose you have in mind than the abrogation of the law.

Yours very truly,

JAY A. SCHILLER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

License Fees of Slaughtering and Rendering Establishments—License Required for Each Plant.

May 9, 1924.

WILLIAM J. CONNORS, Esq., Superintendent, License Department.

Dear Sir:

We have your letter of recent date, in which you state that some of the large operators of slaughtering and rendering plants take the position that the maximum license fee covers any number of plants operated by them. Thus, it is claimed by officials connected with the plant of Morris & Company that because the plant was purchased by Armour & Company the maximum fee of \$4,000 under the ordinance, which is paid by Armour & Company, relieves that company of any further license fee obligation for the Morris & Company plant. The same situation exists with reference to the plant of the Hammond Packing Company, which is now owned by Swift & Company. You ask to be advised whether separate license fees are to be computed and collected in cases of this kind for each plant when one concern operates more than one plant.

It seems quite clear that it was the intention of the City Council that there should be a separate license for each plant. In addition to the general license provisions contained in

Chapter XLIV of The Chicago Municipal Code of 1922, which indicate all through the chapter that a separate license is to be taken out for each establishment or place of business, there are special provisions relating to the business in question that remove any doubt that remains.

The clause preceding the fixing of the license fees in Section 2078 reads as follows:

“The annual license fee under this class shall be based on the number of rendering tanks *in each establishment*, as follows:”

Following this appears the table containing the graduated scale of fees based on the number of rendering tanks. The idea is still further borne out that it is the “plant” and not the corporation that controls the license fee, by the wording of the first line of this table, which reads as follows:

“*Plants* having no rendering tanks or not exceeding three \$400.00”

The same section (2078) also contains provisions relating to the inspection of the plant, a provision concerning the proposed location in the case of new plants, the same words “*in each establishment*” in the clause preceding the license fees of another class of plants, and other things which so clearly indicate the intention of the City Council that the rule of strict construction cannot overcome such intention.

We therefore beg to advise you that the license fee in such cases applies to each plant.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Whether Money Realized From a Bond Issue to Widen
and Extend Robey Street May be Used for Its
Extension Only; Whether Union Stock
Yards and Deering Harvester Works
May be Assessed for Extension
Through Their Plants.**

May 10, 1924.

HON. MAX ADAMOWSKI,

Chairman, Robey Street Subcommittee of Committee on Local
Industries, Streets and Alleys.

Dear Sir:

Your letter addressed to the Corporation Counsel in which you make certain inquiries relating to the Robey street improvements was referred to the undersigned for consideration and reply. You ask the following questions:

- a. Can the money realized from the sale of bonds issued under the authority of the ordinance passed July 21, 1919, for the widening and extending of Robey street be used for opening and extending the street, without widening it?
- b. In extending the street through the stock yards and through the plant of the Deering Harvester Works, would it be possible for the City to assess and collect special assessments from said companies, respectively, for the cost of same?

Answer to the First Question.

It must be borne in mind that the object of the bond issue ordinance was to provide the City with funds for a project thereafter to be determined by the City Council; it was not in itself an improvement ordinance. The purpose of the Robey street bond issue of \$9,200,000 is stated in the bonds as follows:

“For the purpose of paying that portion of the cost and expense to be borne by the City of Chicago which has now accrued and may hereafter accrue in the matter of extension and widening of North Robey Street and South Robey Street from Montrose Avenue to West Eighty-seventh (87th) Street and the extension and widening of Beverly Avenue from West Eighty-seventh (87th) Street to West Ninety-fifth (95th) Street, including the construction of the necessary bridges, viaducts, approaches, tunnels, subways, pavements, and sidewalks, all as may hereafter be determined by the City Council, and including the cost of engineering, valuations, legal services and court proceedings.”

The purpose of the bond issue is also stated in identical terms with the above quotation in the ordinance authorizing the bonds, in the ordinance calling the special election and on the ballot used in the referendum to the electors.

In the “purpose clause” there is a statement that the money is to be used to pay the City’s share of the cost of certain work. Then follows an enumeration of the items of this work which consist of extension, widening, bridges, viaducts, approaches, tunnels, subways, pavements and sidewalks. This is followed by the phrase “all as may hereafter be determined by the City Council.” In this phrase the word “all” is a word of the widest possible inclusion; I consider that “all” refers to each and every of the preceding items of work for which the money might be used, namely, the extension, widening, bridges, etc. I am consequently of the opinion that the phrase “all as may hereafter be determined by the City Council” qualifies every item aforesaid, namely, the extension, the widening, the bridges, etc., and makes each of these features to be such as the City Council might thereafter determine.

There is however in this purpose clause no intimation or direction as to how the various parts of Robey street and Beverly avenue are to be treated. There may be bridges, viaducts and tunnels but they are not located. There may be extension and there may be widening but the places where extension is to apply and the places where widening is to be

made and the degree of widening are not indicated. It is significant that the clause in question does not state that all of Robey street and Beverly avenue are to be widened or that all the closed parts of those streets are to be opened; it does in effect direct that the money is to apply to such opening and such widening between Montrose avenue and 95th street as the Council may thereafter determine.

At the time of the passage of this bond issue ordinance there was not in existence any ordinance of the City Council declaratory of a policy with respect to the improvement of Robey street. It is evident that when the Council passed the bond issue ordinance it was unwilling to commit the City in advance to any detailed and definite plan for the improvement of Robey street and Beverly avenue either with respect to their widening, their opening or any other feature relating to their improvement. The Council therefore left this for its own future legislative determination as is clearly apparent from the phrase "all as may hereafter be determined by the City Council."

Up to this point the City Council, with the bond issue thus authorized, refrained from tying its hands and left itself free to determine in the future such development as it might see fit to make of Robey street and Beverly avenue.

Since the passage of the bond issue ordinance (July 21, 1919) the City Council has not passed any single ordinance or any series of ordinances for the improvement of all of Robey street and Beverly avenue between Montrose avenue and 95th street. A year and a half after the passage of the bond issue ordinance, the Council passed an ordinance for the improvement of Beverly avenue, and four ordinances, each of which was for the improvement of a portion of Robey street, but the four ordinances taken together do not cover all of the present Robey street or all of the places where Robey street is now unopened between the termini named in the bond issue.

Robey street extends north and south along a quarter section line one-half mile west of Ashland avenue and one-

half mile east of Western avenue. It stretches, in a more or less desultory and broken way, from the northern city limits at Howard avenue southward to 101st street. Beverly avenue runs in a northwesterly and southeasterly direction, crossing Robey street at 87th street and crossing Ashland avenue at 95th street. The proceeds of the bond issue are applicable to improvements on Robey street from Montrose avenue to 87th street and improvements on Beverly avenue from 87th street to 95th street; this scheme of improvement has the effect of carrying Robey street at 87th street over in a southeasterly direction to Ashland avenue at 95th street, thus in effect bringing the Robey street traffic into Ashland avenue at 95th street.

The five ordinances above referred to passed subsequently to the bond issue, are as follows in their geographical order, beginning at the north; first an ordinance entitled "An Ordinance for the widening of South Robey street, between West Harrison street and West Roosevelt road" (published December 15, 1920, Council Journal, p. 1280), passed January 3, 1921 (Council Journal, p. 1522); secondly, an ordinance entitled "An Ordinance for the widening of South Robey street between West Roosevelt road and West 23d street" (published in the Council Journal, January 19, 1921, p. 1617), passed February 18, 1921 (Council Journal, p. 1870); thirdly, an ordinance entitled "An Ordinance for the widening of South Robey street between West 47th street and West 51st street" (published January 19, 1921, Council Journal, p. 1618), passed February 18, 1921 (Council Journal, p. 1870); fourthly, an ordinance entitled "An Ordinance for the widening of South Robey street between West Garfield boulevard and West 87th street (published December 15, 1920, Council Journal, p. 1282), passed January 3, 1921 (Council Journal, p. 1522); fifthly, an ordinance entitled "An Ordinance for the opening and widening of Beverly avenue between West 87th street and West 95th street" (published March 28, 1921), (Council Journal, p. 2059), passed May 13, 1921, (Council Journal, p. 212).

The first ordinance above referred to (Harrison street to Roosevelt road) adds 20 feet to the present 66 foot street; the second ordinance (Roosevelt road to 23d street) adds 20 feet to the present 66 feet between Roosevelt road and 14th street and between 17th and 22d streets; adds 10 feet to the present 73 feet between 22d street and 23d street and makes no widening of the present 66 foot street between 14th street and 17th street, so that the resultant street after the widening will have the following width, reckoning from the north end towards the south, viz., 86 feet, 66 feet, 86 feet, 83 feet. The third ordinance (47th street to 51st street) adds 20 feet to the present 66 feet. The fourth ordinance (Garfield boulevard to 87th street) opens one strip and widens the existing part by additions of various widths, so that the resultant is a street 86 feet wide. The fifth ordinance (Beverly avenue from 87th street to 95th street) adds strips of various widths, giving a resultant total of 79 feet.

No ordinances have been passed for widening or opening Robey street except those above mentioned. At the present time Robey street between Montrose boulevard and 87th street has seven different widths, namely, 20 feet, 33 feet, 50 feet, 66 feet, 73 feet, 80 feet and 100 feet. After the widening provided for in the foregoing ordinances the portions of Robey street not affected by these ordinances will have widths of 33 feet, 50 feet, 66 feet, 73 feet, 80 feet and 100 feet.

Thus it appears that no uniformity of width has been provided for in the portions unaffected by the five widening ordinances and that in the second widening ordinance itself there are to be varying widths of 66 feet, 83 feet, and 86 feet. Furthermore, Robey street between Montrose boulevard and 87th street is discontinued in four places, namely: from Diversey boulevard to Fullerton avenue; from the South Branch of the Chicago river to 35th street; from 39th street to 43d street and from 74th street to 75th street. The only one of these discontinuances for the opening of which an ordinance has been passed is that which extends from 74th street to 75th street. It may be added that Robey street

from Montrose boulevard to 87th street is $15\frac{1}{2}$ miles long and that the improvement ordinances so far passed cover $6\frac{1}{3}$ miles.

From a consideration of the foregoing matters as to the present nature and condition of Robey street and Beverly avenue and of the provisions of such improvement ordinances as have been passed, it may justly be inferred that the City Council has not ordained any general policy as to Robey street but has left the question of what shall be done and what shall not be done in the way of widening or opening or proceeding by tunnels or subways or viaducts and the like entirely to be determined by such ordinances as it may choose to pass; also, that it may justly be inferred from the ordinances which the City Council has passed that it is not attempting to widen all parts of Robey street above their present width or to maintain a uniformity of width in such portions as it does widen.

I am therefore of the opinion:

That your first question can be answered in the affirmative: the proceeds of the bond issue may be used for opening and extending Robey street in all or any one or more of the places where it is not now opened, regardless of the width adopted or to be adopted for the portion or portions thus to be opened and extended, and regardless of whether any widening be provided for all or any part of the street now open and which has not already been ordered to be widened.

To this it may be well to add the following by way of caution. In case the City Council should pass an ordinance or ordinances for opening and extending any part of Robey street as, for example, from Diversey boulevard to Fullerton avenue or from the South Branch of the Chicago river to 31st street the question might arise as to whether any given width was obligatory. Of course opening a street is not widening it. A widening cannot be predicated of that which has no existence. The Council may use its own discretion in determining how wide it shall make its street openings on Robey street. Nevertheless their legislative discretion is subject to judicial review and may be set aside by the courts

if they consider that it has been exercised so improvidently as to make the proposed improvement unreasonable, harsh or oppressive. I am far from wishing to say that in case of the opening of any parts of Robey street such parts must be of equal width with the adjoining and already existent portions of the street. Nevertheless the widths selected for opening must be consistent with the needs of traffic upon a greater extent of the street than the part directly to be opened; and this will in part be determined also by the nature of the improvement to be made on the opened portion, as for example whether it be an improvement on the surface or by a viaduct or by a tunnel.

Answer to the Second Question.

Your second question reads: "In extending Robey street through the Stock Yards and through the plant of the Deering Harvester Works, would it be possible for the City to assess and collect a special assessment from said companies, respectively, for the cost of same?"

The question of the power to levy and collect special assessments against a given property for a given improvement depends on certain questions of fact, namely: the nature of the proposed improvement, the nature of the property, and how the proposed improvement will affect the value of the property to be assessed. I am informed by the President of the Board of Local Improvements that to extend Robey street through the Deering Harvester Works on the ground level would result in prodigious damages against the City; that the street would have to pass over the property on a viaduct, which would be continued southward to connect with a proposed bridge across the North Branch of the Chicago river. A detour has been considered by the Board but I am informed that it is not satisfactory and they would recommend a viaduct. The improvements at the Stock Yards in the line of Robey street extended are well known and the President of the Board informs me that a viaduct would have to be constructed there also. Hence, in each case there would

be no actual accessibility to the proposed streets at the viaduct level from the property adjacent to the viaducts. The President of the Board of Local Improvements informs me that it is his opinion and that of real estate experts whom he has consulted that carrying Robey street through these two plants by means of a viaduct would work considerable damage over and above benefits if any to the adjoining property. From my own experience I concur in this.

In answering your second question I am therefore of the opinion:

That it would be impossible to assess benefits against the Deering Harvester Works and the Union Stock Yards to pay for the whole or any substantial part of the cost of condemning an easement for Robey street and constructing viaducts across these plants.

That the opening of Robey street through the property of the Deering Harvester Works and of the Union Stock Yards would have to be carried out under the Eminent Domain Act, the cost of the same to be paid out of the Robey street bond issue.

That the construction of viaducts over the property of the Deering Harvester Works and the Union Stock Yards after Robey street shall have been opened through the same would fall within the powers of the Department of Public Works and the cost could be defrayed from the Robey street bond issue.

That the construction of the bridge across the Chicago river to connect Robey street if opened between Diversey parkway and Fullerton avenue would be under the jurisdiction of the Department of Public Works and the cost could be taken from the Robey street bond issue.

Respectfully submitted,

EUGENE H. DUPEE,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Promotions of Civil Service Employees in the Board of Education.

May 13, 1924.

HON. WM. F. FOEHRINGER, Secretary, Civil Service Commission.

Dear Sir:

In answer to your request for an opinion "as to the power of the Civil Service Commission to enforce compliance with the provisions of the Civil Service Act and the rules of the Commission in relation to promotions by the Board of Education of employes appointed pursuant to the provisions of a Civil Service Law," we submit the following:

The law of Illinois providing for the creation of Boards of Education in cities exceeding 100,000 inhabitants empowers the Board to appoint the executive officers (Sec. 129), and provides that appointments, promotions and transfers of teachers, principals, assistant and district superintendents, and all other employes *in the teaching force*, shall be made by the superintendent of schools, subject to the approval of the Board of Education. (Sec. 130.)

A further provision of the law is as follows:

"Appointments and promotions of teachers, principals and other educational employes shall be made for merit only, and after satisfactory service for a probationary period of three years (during which period the board may dismiss or discharge any such probationary employe upon the recommendation, accompanied by the written reasons therefor, of the superintendent of schools), appointments of teachers and principals shall become permanent, subject to the rules of the board concerning conduct and efficiency, and subject to removal for cause in the manner provided by Section 161 of this act. * * * (Section 138.)

In this way, the appointments and promotions of all educational employes are specifically provided for, and must be made upon merit only.

Another class of employes designated in the statute is provided for in Section 129 as follows:

“The board also may appoint, or provide for the appointment of such other officers and employes as it may deem necessary, pursuant to the provisions of the Civil Service Law, except as otherwise provided herein.”

And again in the same section:

“All appointments of other employes of the board of education, except as herein otherwise provided, shall be made pursuant to the provisions of the civil service law, and no civil service employe shall be removed except for cause, and then only by a vote of not less than a majority of all members of the board, upon written charges to be heard by the board, or a duly authorized committee of the same. * * *”

It is to be noted that these employes are designated civil service employes, and that they are the only employes of the Board of Education for whose promotion no proceeding by the Board is authorized. The Civil Service Law requires that all employes not exempted from the classified service be promoted on the basis of ascertained merit and seniority in service (Section 9, Chap. 24 $\frac{1}{2}$, Smith-Hurd Statute). The only “school” employes exempted from the classified service are the superintendent and teachers of school. (Section 11 *id.*)

The Civil Service Law was in existence at the time the present school law was enacted and it is to be presumed that the legislature had in mind the provisions of that law when it made the appointment of certain school employes subject to the Civil Service Law.

It would seem that the clear intention of the legislature was that such employes are to be subject to the Civil Service Law in the full intent and meaning of that law, and that the appointment includes not only the original entrance but the promotional appointment also. It is well understood

that promotion is universally required to be made upon the merit test, and that the object of the law would fail if this were not so and the appointing authority left to be the judge of the fitness of the applicant instead of the Commission.

We have searched diligently for any decision of a case which might decide the question, but find none. Judicial definitions also have been of little aid.

The term promotion has been defined as an advancement, or an act of exalting in rank or honor (Webst. Dict.); and as advancement to a higher position, grade, class, or rank; preferment in honor or dignity (Standard Dict.). The only exceptions which have been made are the cases of policemen or firemen for exceptional heroism, which in itself is a test of fitness. In the absence of regulations calling for tests of fitness for promotion, the way is open for the making of promotions under the name of transfers, which can only be legally made when they do not in fact constitute promotions.

As was well said in *Hale v. Worstell et al.*, Ct. Apps., N. Y., 1906 (N. E. Rep. 77, page 1177):

“If appointing officers are allowed to make transfers among those in the competitive class without regard to grade, class of work, or compensation, providing only that the person so transferred is upon the eligible list for the position to which he is transferred, the beneficial effects obtained by the constitutional provision will be substantially overcome. Such a transfer would enable a person hopelessly low on an eligible list for an important place in the classified service to obtain an appointment, through personal or political influence or favoritism, if he could once obtain an appointment to any inferior place in the service. Such transfers would demoralize the service.”

Also 5 R. C. L., page 616.

28 Cyc., p. 416.

McQuillin, in his work on Municipal Corporations, says:

“Promotions in office or public situation may be made from time to time by the proper authority without restrictions; however, when the exercise of this privilege is regulated by law, all promotions must be made

in accordance therewith. Such provisions exist where a merit system has been established in the municipal service. * * *

(Vol. II, Section 507.)

And exception is not made even of persons who have preference for appointment to the police force as honorably discharged soldiers.

Such a discharged soldier sought to be preferred over roundsmen in the department for promotional appointments and it was held on appeal affirming an order denying a writ of mandamus that the word *appointment* did not include *promotion*, and that the promotions of officers and members of the police force must be made by the Board only upon the grounds of meritorious police service and superior capacity.

Matter of McGuire, 50 Hun, N. Y. 203.

Uhte v. Rosenthal, Cal. App., 174 Pac. 83.

We must remember too that when passing the school law of 1917 in which the Board of Education was declared to be a body politic and corporate, the legislature was cognizant of the fact that "theretofore the Civil Service Act of the City applied to officers and place of employment under the Board." *Brennan et al. v. Peo. et al.*, 176 Ill. 620. And being so cognizant it did not withdraw these employes from the operation of the civil service system in terms, and, as we believe, by no necessary implication under the rules for the construction of statutes.

The power of appointment by the Board of civil service employes under Section 129, *supra*, is qualified by requiring the appointment to be made from persons who have been ascertained to be competent by examination under the civil service system. Our Supreme Court, in *Peo. v. Loeffler*, 175 Ill. 585, in which the question determined was the applicability of the Civil Service Act to the appointment of various clerks and subordinates in the offices of the City Clerk and Collector who had the power of appointment under the Cities

and Villages Act prior to the enactment of the Civil Service Law, said :

“It may be said that, in a certain sense, the power to appoint these clerks and subordinates still remains with the city clerk. The Civil Service Act does not take away the power of appointment absolutely, but qualifies such power by requiring appointments to be made from persons who have been ascertained to be competent by examinations under the Civil Service Act. Under the provisions of the Civil Service Act the city clerk still appoints his clerks and subordinates, and, as the power of appointment thus remains with him, it cannot be said that it has been altogether taken from him by the Civil Service Act, even if that act applies to positions in his office. Neither the city clerk, nor any other public officer, should appoint men to subordinate positions in his office, unless they are qualified to perform the duties of such positions. The Civil Service Act merely substitutes the results of the examinations required by such act for the uncontrolled will of the appointing officer in the matter of selecting those, who are to perform the required duties. We are of the opinion, that the Civil Service Act applies to the clerks and subordinates in the office of the city clerk, because Section 22, above referred to, has been repealed by the act, so far as the mode of selecting appointees is concerned.

The provisions of the Civil Service Act are in conflict with Section 22 of Article 7 of the City and Village Act. Under Section 22 the city clerk has the power to appoint his employes, and such appointments were during his pleasure. But the Civil Service Act establishes a new system, by which all city employes are to be selected on account of their fitness and merit, as ascertained by examinations held under and in pursuance of the law. The act, which requires appointments thus to be made, is necessarily in conflict with an act, which left such appointments to the uncontrolled will and discretion of the appointing power. It is true, that there is no express repeal in the Civil Service Act of said Section 22. It is also true, that repeals by implication are not favored.”

While in this matter the school law is the later act, there is no express reservation of promotions of these particular

employees, and therefore no inconsistency or conflict between the two laws neither in subject-matter nor in procedure.

In conclusion, we beg to say that there is nothing in the submitted letter of Mr. Ralph R. Condee, Assistant Attorney of the Board, which would, in our opinion, support the view that promotion of a civil service employe must be made in any manner not in pursuance of the Civil Service Law. If there is any question that the change of duties of these particular employees mentioned in the letter has a different effect than promotion, we have not been asked to pass upon it, and the foregoing is written and our opinion is formed thereon only as to the promotions of the employees designated as civil service employees in the school law.

We are of the opinion that the promotions of the "civil service employees" named in Section 129 of the school law must be made in pursuance of the Civil Service Law.

Very truly yours,

CORA B. HIRTZEL,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Restaurant on Municipal Pier—Authority of Commissioner of Public Works to Prescribe How It Shall be Operated.

May 16, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

You have requested the Corporation Counsel for an opinion as to the legality of permitting George B. Levee, the concessionaire who has the privilege of selling refresh-

ments and soft drinks on the Municipal Pier, to cut down the quantities and kinds of foods which he sells in his restaurant, for the purpose of obtaining lower prices in general for the public in these commodities. The proposed plan is that the said George Levee instead of selling hot meats and other cooked foods in his restaurant on the third floor of the recreation section of the Municipal Pier, shall sell sandwiches of various kinds, coffee, soft drinks and possibly beans and spaghetti.

The lease provides on the second page thereof, that "the operation of a restaurant on the third floor of said recreation section is one of the essential conditions of this contract, and that said restaurant shall be operated to the reasonable satisfaction of said Commissioner of Public Works." Although it is true that the selling of sandwiches and soft drinks might not be sufficient to come within the ordinary definition of the word "restaurant" nevertheless, we are of the opinion, that since the lease itself provides that the restaurant shall be operated to the reasonable satisfaction of the Commissioner of Public Works, the said Commissioner has the authority, under the lease, to prescribe how the restaurant shall be operated. In this connection, attention is also called to the provision in the said lease to the effect that "the concessionaire hereby covenants and agrees to sell, vend, serve and dispense food, non-alcoholic beverages, tobacco, confections, novelties, souvenirs, flowers, publications, operate games, structures, devices, apparatus, enclosures, amusements, entertainments, or commodities and like articles in and at such places and location on said recreation section of the Municipal Pier, *and in such manner and at such times as may be determined by said Commissioner of Public Works during said term of this agreement.*"

In view of the great latitude given the Commissioner of Public Works to prescribe the manner in which a restaurant shall be operated, we are of the opinion that although the selling of sandwiches and soft drinks might not ordinarily constitute a "restaurant" within the usual meaning of the word in law and in fact, nevertheless, the terms of this

lease give to the Commissioner of Public Works the power to vary the customary meaning of the word "restaurant."

We see no legal objection to the proposed plan.

Respectfully submitted,

ALBERT H. VEEDER,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Letting of Contracts—Exercise of Discretion by Department Head—Meaning of "Lowest Reliable and Responsible Bidder."

Chicago, May 17, 1924.

HON. JOHN T. MILLER, Commissioner of Gas and Electricity.

Dear Sir:

You referred to us the question of whether you are justified in awarding a contract for three motor trucks to the Mack-International Motor Truck Corporation despite the fact that this company was not the lowest bidder. Accompanying your letter are three copies of the contract, with bonds attached thereto, which you submit for our approval.

The reason you assign for your desire to award the contract to one who is not the lowest bidder is expressed in the following sentence:

"We consider the trucks furnished by the Mack Corporation to be far superior for our uses, to give better service, and to have a longer life than those furnished by the low bidder, and to be more than worth the slight difference in prices quoted by the latter."

You state the estimated amount of the contract to be \$16,116.05, but you do not say what the difference in the bids amounts to.

While the statements in your letter contain excellent reasons for the exercise of your discretion in the way you have done, they fall just short of giving us anything definite

on which to base an opinion with certainty. The statements are too general to admit of an exact reply.

Briefly stated, the law with respect to your rights in such cases is as follows: The head of the department is given power to let contracts in the same manner as is provided for the letting of contracts by the Commissioner of Public Works. (Sec. 50, The Chicago Municipal Code of 1922.) Such contracts should be awarded to the "lowest reliable and responsible bidder." (Sec. 3262.) This gives the executive officer a discretion, which, if reasonably exercised, cannot lawfully be overridden even by a court. But it is not an arbitrary discretion. It must be based on some reasonable fact or condition which appeals to the officer's judgment and good sense. If he comes to the conclusion that the City's interests will be better served by giving the contract to a bidder whose bid is only slightly higher he will have the right to do so. If the successful bidder is much higher there would have to be such important matters in his favor as to amount to impelling causes and conditions that prevent an immediate letting without re-advertising.

We would hesitate to advise you to discard the lowest bidder if the difference in price is great, and we would not so advise you in case there is no showing as to the comparative value of the two products offered. In the absence of any data along these lines, we suggest that you would be on firmer ground if you secured an order of the City Council confirming your decision.

We have drafted an order suitable for this purpose, and we submit same herewith. It will require a two-thirds vote of the Council. We will retain the forms of contracts and bonds you have sent us and will wait, before fixing our approval as to form, until the City Council has taken action on the proposed order.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Payment of Two Per Cent Tax to City by Foreign Fire Insurance Companies—Tax is Placed on All Business Done by Agent Located in City.

May 20, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir :

You state, in your letter of recent date, that foreign fire insurance companies have been paying over to the City two per cent on their Chicago business, and you ask whether this two per cent is to be based on all business done by these companies or only on such insurance as applies to the people and property within the limits of the City.

The two per cent tax which we are collecting for the "maintenance, use and benefit of the fire department," is the one provided for by the Act of 1895. (See Cahill, Rev. St. 1923, p. 716, Par. 1036.) The language in that act very plainly indicates the intention of the Legislature to have such tax apply to all the business done in the City, regardless of whether it is on Chicago property or otherwise. It says such foreign fire insurance companies shall pay "a sum not exceeding two per cent of the gross receipts *received by their agency* in such city, town or village."

The City Council, proceeding on the theory that the words "not exceeding two per cent" might be understood as leaving it within the discretion of the Council to fix a smaller amount, passed the ordinances necessary to establish this figure. It appears as Chapter XXXII of The Chicago Municipal Code of 1922.

Section 152 requires the agent to make return to the Comptroller under oath "of all premiums which, during the year ending on the first day of July preceding such report, shall have been received by him, or any other person for him, in behalf of any such corporation, company or association."

Thus, it will be seen that there should be no doubt as to the scope of the tax. If any doubt exists, it is probably due to the peculiar wording of Section 23 of Article VII of the Cities and Villages Act, which provides for a two per cent tax on *net* receipts but which was held repealed by implication in *City of Chicago v. James*, 114 Ill. 479, and in other cases. There seems to be no reason for continuing to print this last mentioned section in the various editions of the statutes, but it appears in all of them and tends to create confusion.

There will be in all likelihood, no objection on the part of the insurance companies affected, on account of the strict enforcement of this provision, because they receive credit for the payments thus made on their annual state privilege tax. Section 1 of the law in relation to the taxation of non-resident insurance companies, after fixing the annual state tax, provides as follows:

“There shall be deducted from the tax thus computed the amount (if any) paid by such corporation, company or association to cities and villages as a tax on premiums received by such corporation, company or association in such cities and villages during the preceding calendar year for the benefit of organized fire departments, and the remainder shall be assessed against such corporation, company or association as its annual privilege tax.”

From the above you will understand that the law requires that the tax shall be two per cent on all amounts the agents in question receive as premiums.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Abandoned Water Tunnel at Stevens Hotel Site.

May 20, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir :

We have before us your letters in relation to the abandoned water tunnel fifty or more feet below the surface at the site of the proposed Stevens Hotel, on Michigan avenue near Eighth street. You state, among other things, that you feel that the Department of Public Works should stand the expense of constructing bulkheads in order to overcome the interference with the caissons that are about to be sunk there, and you ask whether it would not be good policy for the Law Department to secure some agreement with Mr. James W. Stevens, the owner of the property, against the possibility of future litigation.

The respective rights of the City and the owner with reference to the situation that exists on this property have frequently been discussed since the matter has arisen. You will find among your files an opinion from this department which appears in the printed book of Opinions from January 1, 1920, to April 5, 1923, at page 866. This holds that the City has no right which it can assert, and advises the Commissioner of Public Works (Mr. Francis) to take steps to have the tunnel removed.

We are convinced that the City was not a trespasser when it entered the premises, although there does not appear to be any agreement for an easement on file among the City's documents. We, therefore, again recommend that you proceed with such work as may be necessary to seal up the bulkhead which cuts off the water, so that there will be no flooding of the work when the caissons for the new building are sunk.

The letter of Mr. Stevens of March 7, 1923, addressed to the former Commissioner of Public Works, calls upon the City to remove the tunnel and restore the property to its original condition. We assume that if this was literally complied with a great deal of unnecessary work will be done. Hence, we suggest that your engineers should get in touch with those employed on the proposed building and ascertain what is necessary. Incidentally, some understanding might be had to the effect that if the City accomplishes the required work there should be no claim for damages, although we are not in a position to insist on this agreement as a condition precedent.

The work in question ought to be done without delay, so as to avoid further complications, and word should be sent to the Commissioner of Buildings to grant an extension of the building permit, if necessary, on account of the delay which the owner and his architects claim was caused by the City.

We are this day addressing a letter to Mr. Stevens, in which we inform him that we have advised you to proceed without delay on the work of restoring the premises where it is essential to do so, and suggesting to him that if there are any engineering or legal obstacles to your going ahead with same so as to avoid loss to either party we will take them up at his convenience and dispose of them by agreement. We enclose a copy of this letter.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Commissioner of Health Acting as Member of a Local
Board of Health.**

May 20, 1924.

HON. FRANK J. LINK,

Chairman, Committee on Public Health.

Dear Sir:

At the meeting of your committee held on May 13, 1924, you asked the writer to give you an opinion as to whether it would be lawful for the Commissioner of Health to be a member of the proposed local Board of Health.

Under the common law rule that a person cannot hold two incompatible offices, there is serious doubt as to whether one person can hold two such positions. This, of course, can be overcome by statute, as in the case of the Mayor, who is a member of the City Council with a vote when there is a tie. It may be that since the Board of Health is to be created by ordinance, a provision in such ordinance creating the board which says that the Commissioner shall be a member might, in the same way, be sufficient to overcome the common law rule. We would say that such a provision would have that effect if it were not for the fact that to the extent of authority for its creation the local Board of Health would be a statutory body. All decisions on this point which we have examined touch the question only inferentially. We cannot, therefore, avoid the conclusion that there would be at least room for debate in case the matter was questioned.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Authority of Commissioner of Public Works to Issue
Permit to Chicago Rapid Transit Company to
Relocate Stairway and to
Extend Platform.**

May 21, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We beg leave to reply to your letters of the 26th ult. and 29th ult. respectively, in which you ask us to advise you concerning your authority to issue permits to the Chicago Rapid Transit Company authorizing certain alterations and reconstructions at elevated railroad stations.

The application transmitted with your letter of the 26th ult. seeks permission for the removal of the present stairway leading from the north end of the elevated platform at East Adams street and South Wabash avenue to the sidewalk on the west side of South Wabash avenue, and for the reconstruction of said stairway at a point further north, so that a new alley to be opened from South State street to South Wabash avenue may be free and unobstructed.

The application accompanying your letter of the 29th ult. seeks permission to lengthen the elevated platform at Addison street and to construct a new stairway leading from such platform when lengthened into Addison street. The application states that such alterations will increase the facilities for handling the great number of persons traveling to and from the National League Ball Park.

The elevated station at East Adams street and South Wabash avenue is maintained under authority and permission contained in the ordinance of the Union Elevated Railroad Company, passed October 14, 1895. Said ordinance contains the following language relating to the construction and maintenance of stations, platforms and stairways:

“Stations—stairs—lighting and heating.) Section 4. The Union Elevated Railroad Company shall have permission and authority, and the same are hereby given and granted to it, to construct and maintain in the route hereby authorized, all necessary or proper stations, platforms and depot stations, and to connect the same with Wabash avenue, by means of all necessary stairs, stairways, elevators, landing places and other constructions and appliances for ingress, egress and the accommodation of passengers; but such platforms, stations, stairs, stairways, elevators, landing places, etc., shall be so constructed and maintained as not to unnecessarily impair the usefulness of such avenue, or any portion thereof. * * * *The permission and authority to locate, construct and maintain all such requisite platforms, landings and lines of stairs leading to and from the sidewalks of the street and avenue, and the said elevated stations, being herein expressly granted said company, whenever and wherever such methods of reaching said stations may be found necessary. * * * The plans and specifications of such depots, platforms and stairs shall be submitted to and approved by the commissioner of public works before the work of construction thereof shall have commenced.”*

The station at Addison street is maintained under authority and permission contained in the ordinance of the Northwestern Elevated Railroad Company, passed January 8, 1894, and amendments thereto. Said ordinance provides as follows:

“Station—lighting and heating—fuel—drippings, etc.) Section 7. The said company shall have permission and authority, and the same are hereby given and granted to it, to construct and maintain over the streets, avenues and alleys, or portions thereof across which its said elevated railroad is to be permitted to be constructed as aforesaid, all necessary or proper stations, platforms and depot stations, and to connect the same with said streets, avenues and alleys by means of all necessary stairs, stairways, elevators, landing places and other constructions and appliances for ingress, egress and the accommodation of passengers; but such platforms, stations, stairs, stairways, elevators, landing places, etc., shall be so constructed and maintained as not to unnecessarily

impair the usefulness of such streets, avenues or alleys or any portion thereof. * * * *The permission and authority to locate, construct and maintain all such requisite platforms, landings and lines of stairs, leading to and from the sidewalks of the streets, avenues and alleys and the said elevated stations, being herein expressly granted said company, whenever and wherever such methods of reaching said stations may be found necessary. * * * The plans and specifications of such depots, platforms and stairs shall be submitted to and approved by the commissioner of public works before the work of construction thereof shall be commenced.*"

The general authority contained in the provisions quoted above are, however, subject to the restrictions contained in Section 4 of the Through-routing Ordinance of July 28, 1913, which limits elevated platforms outside the "Union Loop" to not more than three hundred thirty feet in length, and in Section 3 of the Platform Ordinance of January 26, 1914, which limits stairways at stations on the "Union Loop" to not more than six feet in width.

Subject to the restrictions just referred to, we are of the opinion that the jurisdiction and discretion vested in the Commissioner of Public Works by those ordinances extends to such alterations as are contemplated by the applications hereinbefore referred to.

The present applications, however, are in the name of the Chicago Rapid Transit Company, which company claims to hold and exercise the rights and privileges heretofore vested in the Northwestern Elevated Railroad Company and Union Elevated Railroad Company, respectively. We are therefore of the opinion that all permits issued to the Chicago Rapid Transit Company should contain the following language:

"This permit is issued under the express understanding and agreement that the City of Chicago does not, by the issuance thereof, recognize any succession by or transfer to the Chicago Rapid Transit Company of any right or privilege heretofore possessed by the Northwestern Elevated Railroad Company, South Side Elevated Railroad Company, Union Elevated Railroad Company, Metropolitan West Side Elevated Railway

Company or Chicago and Oak Park Elevated Railway Company except such rights and privileges as said Elevated Railroad Companies could by law transfer or assign without the present consent of the City of Chicago; nor does said City of Chicago by the issuance of this permit, waive, impair or, in any manner, estop itself to assert any right possessed by said City under ordinances granted to said Elevated Railroad Companies nor any right of said City arising on account of any transfer or attempt to transfer the rights and privileges of said Elevated Railroad Companies, or any of them, without the present consent of the City of Chicago."

We transmit, herewith a copy of a letter received from Mr. P. J. Lucey, attorney for the Chicago Rapid Transit Company in which he states that the Company has no objection to such reservations being included in construction permits issued to such Company.

Respectfully submitted,

C. M. DOTY,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Authority of Chicago Surface Lines to Charge to Joint
Account a Sum Expended for Appraisal of the
Company's Properties for Use in Rate Cases.**

May 21, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We have your letter of the 14th inst. requesting this office to advise you whether you should permit an item of \$184,573.46, charged by the Chicago Surface Lines to Joint Account, to stand as charged. We note that this amount was

expended for an appraisal of the companies' properties for use in the rate cases and was charged as an operating expense. We also note that your office is of the opinion that this item is not an operating charge as contemplated by the ordinance.

It is our opinion that this charge should be allowed. The cases in which this expense was incurred were tried before the Illinois Commerce Commission, which body the legislature has invested with full power and authority to determine and fix the rates charged by utility companies in the State.

The Commission found in favor of the companies, and although the City appealed from the orders of the Commission, the appeals were subsequently dismissed on the City's own motion, making the orders of the Commission final until such time as the Commission itself might change the rates so ordered. It must, therefore, be taken as adjudicated finally that the rates previously charged were insufficient and inadequate to enable the companies to perform the functions and render the service the law requires. We are clear, therefore, that in view of the facts and circumstances surrounding this particular case, this expense incurred in the prosecution of a proceeding brought to protect the revenues of the companies in order to insure and make possible the continued operation and maintenance of the service is properly chargeable as an operating expense. Moreover, the amount in question was allowed by the Board of Supervising Engineers and we think their finding ought not be disturbed.

As to whether or not all sums expended in the prosecution or defense of any or all rate cases may be so charged, we do not now decide, but we think the particular item to which you refer should be permitted to stand as charged.

Yours very truly,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Refund of License Fees Paid Under Ordinance Declared to be Invalid.

May 22, 1924.

HON. GUY GUERNSEY,

Chairman, Sub-committee of Committee on Finance.

Dear Sir:

We have before us a file of letters and documents relating to claims for refunds of license fees paid by the firms mentioned below, concerning which you propound the following question: "Will you kindly furnish this Committee with an opinion as to the right of the City to make these refunds?" We quote your question because there is sometimes a distinction between the right of the claimant to a refund and the right of the City Council to make a refund.

The claims are all founded on the fact that the license fee exacted from "merchandise brokers or manufacturers' agents" was held invalid in the case of *Linehan et al. v. City of Chicago et al.*, 227 Ill. App. 255. The word "broker" as used in this case is a misnomer, as the class of business defined was held not to be a brokerage business.

While the ordinance licensing this class of business was held void, it is only in exceptional cases that a refund could be demanded. The rule is that taxes or license fees voluntarily paid cannot be recovered back even though illegally exacted. Not even payment under protest will reverse this rule, but to entitle the payor to a refund there must be coercion or duress.

The rule as to voluntary payment is thus stated by one of the leading text writers:

"Section 1621. *Voluntary Payment: Mistake of Law.*—Money voluntarily paid to a corporation under a claim of right, without fraud or imposition, for an illegal tax, license, or fine, cannot without statutory aid—

there being no coercion, no ignorance or mistake of facts, but only ignorance or pure mistake of the law—be recovered back from the corporation, either at law or in equity, even though such tax, license fee, or fine could not have been legally demanded and enforced.”

Dillon on Mun. Corp., 5th Ed., Sec. 1621.

The same writer gives the rule as to the extent of compulsion or duress in the following language:

“Section 1620. *Compulsion defined.* The coercion or duress which will render a payment of taxes *involuntary* must in general consist of some actual or threatened exercise of power possessed, or assumed to be possessed, by the party exacting or receiving the payment, over the person or property of another, from which the latter has no other means or reasonable means of immediate relief except by making payment.”

Having in mind the principles thus defined, which are generally recognized, and which have been sanctioned by our own Supreme Court, we submit the following with respect to the facts presented to us:

R. L. Cairncross and National Lock Washer Co.

A strictly technical defense as to this party's claim would probably result in a victory for the City, although there is some doubt on this point as to the \$12.50 paid on January 3, 1921. It is claimed that in addition to receiving the notice from the prosecutor's office under date of December 17, 1920, a policeman called on the day the check was mailed. The fact that it was sent to the City Prosecutor lends color to the claim of coercion. Hence, while the parties fell short of asserting their rights so as to recover, we recommend the allowance of this sum. The other payments cannot be recovered, under the law as stated above.

Schaeffer & Budenberg Mfg. Co.

There is nothing in the file presented to us which indicates that these parties are entitled to a refund. They say they were not conducting a manufacturers' agent business, but there is an issue of fact on this point, and in addition

thereto if they are correct on this point they would have been liable for another license fee of at least the same amount.

Blake & Stearns.

There is no evidence of coercion or protest in this case except as to \$12.50, which may have been wrongfully collected. The City Collector does not say whether they had a salesman in their employ or not. We recommend an allowance of \$12.50 on their statement to the effect that a mistake was made.

Joseph A. Berger.

There is nothing in the file presented to us which indicates that this party is entitled to a refund, there being no evidence of either coercion or protest.

Turning now to the question of the right of the City Council to order a refund, we find that there is respectable authority to the effect that where there is a moral obligation on the part of the City it has the right to make such refund even though the claimant could not successfully maintain suit for recovery.

Thus, it was said, in *State v. Butler*, 11 Lea, 418:

“Notwithstanding the voluntary payment of taxes illegally assessed does not constitute or confer a right of action to recover them back, yet it did create a moral obligation on the part of the City to repay them, and was a sufficient consideration to support a subsequent promise to do so.”

In *Blum Co. v. Town of Hastings*, L. R. A. 1918 F 782 (Fla.), it was held by a divided court that a general right exists in the common council or other proper boards of incorporated cities or towns to refund to individuals any sums paid by them as corporate taxes which are found to have been wrongfully exacted or for any reason inequitable.

Acting on such authority as is indicated above the Law Department has on several occasions advised the City Council

that it had the right to make a refund where the claimant could not have recovered, on the theory that in the particular instance gross injustice would result.

The law on this is not, however, so well settled as it might be. Dillon questions it in the following language:

“But *quaere* as to any *inherent* power in the City authorities without legislative sanction to convert mere moral obligations not enforceable at law or in equity into legally binding obligations.”

Dillon on Municipal Corporations, 5th Ed., Section 1623, Note.

In other cases it has been deemed necessary to pass curative statutes in order to permit a refund of unearned license fees. (See *Calderwood v. Jos. Schlitz Brewing Co.*, 107 Minn. 465.) Even in this state it was considered proper to make provision for refunding unearned license fees. (*People v. McBride*, 234 Ill. 146.)

Therefore, we are far from satisfied that there is justification in laying down any general rule on the subject of refunds that would permit them in any case where it was found that the tax had been illegally collected.

We do not ordinarily make a practice of suggesting a general policy when we are called upon for an opinion. But we deem it our duty to say that to adopt a policy of making refunds merely because an ordinance imposing a license fee was held invalid may lead to grave consequences.

Several years ago the City Council undertook to license many occupations that it manifestly had no power to license. In many instances that was done by the voluntary agreement of parties who have since gone into court (or at least allowed the use of their names) in actions to annul the ordinances prescribing such fees.

The Law Department has recommended the repeal of all such ordinances as are plainly invalid, but we are making every effort to enforce those which we have any chance of sustaining. The “merchandise brokers or manufacturers’

agents'' ordinance was one of these. There was just enough doubt concerning the definition of the word "brokers" as used in the statute delegating power to the City to give us a fighting chance. The court decided against the City, as it undoubtedly will in some other cases. It is plain that any comprehensive policy of refunding in such cases may involve large sums of money.

We have gone into the subject before us very fully in order that you may be guided in the class of claims which you presented, which we understand are numerous. We return herewith the files which you turned over to us.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Claims Against Arthur Henderson and the Electrical
Material Company for Material Due the Depart-
ment of Gas and Electricity Under Con-
tracts 7118 and 7177 of 1922.**

May 22, 1924.

HON. ROSS A. WOODHULL,
Chairman, Committee on Finance.

Dear Sir:

In answer to your communication under date of March 19, 1924, and the report of the accounting firm of Haskins & Sells transmitted therewith, bearing on the above claims, I submit the following report of the status of the claims and what has been done respecting them.

Investigation has disclosed that there is due, in value, undelivered material under contract No. 7118, from the Electrical Material Company, \$22,550.49, and under contract No. 7177, from A. F. Henderson, \$106,523.01.

On creditors' petition the Electric Material Company was declared a bankrupt March 24, 1924. Total appraised assets are \$7,031.18, with scheduled claims amounting to about \$800,000. The City of Chicago is recognized here as a creditor in the sum of \$106,000. The bankruptcy proceeding is pending.

On March 8, 1924, praecipes were filed by the City in the Circuit Court in three cases; two on the contractor's bonds with the Southern Surety Company as co-defendant in each case, and another against George E. Carlson, former Commissioner of Gas and Electricity, on his official bond, also with the Southern Surety Company as co-defendant.

These matters were referred to me March 20, 1924. A careful examination of the contracts and bonds and the law of the case leads to the conclusion that covenant actions alone will lie. The Southern Surety Company is bonded for \$55,000 in behalf of Henderson, and for \$20,000 in behalf of the Electrical Material Company. The records in bankruptcy indicate that little or nothing may be expected from the latter company, and Henderson himself is generally reputed to be a bankrupt. \$75,000 is the limit of recovery that may be had in the actions on these contractors' bonds. Any balance remaining due as damages to the City may be sought in the action on the official bond of George E. Carlson, on the theory of his malfeasance or misfeasance in office, and here again the Southern Surety Company is on the bond.

Examination of the records, files, transcripts and mass of evidence introduced at the recent Carlson-Henderson conspiracy trial plainly indicates that the theory there successfully adopted to secure acquittal will be resorted to by the defense in actions by the City, namely, that there was no malfeasance or misfeasance on the part of the principal defendants, but that there was such conduct on the part of the City

as to exempt the surety from liability on the contractors' bonds.

The declarations in the three cases are due to be filed on or before June 6th, next. They are in process of preparation and will be filed when completed.

Yours very truly,

FRANCIS J. VURPILLAT,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Appropriation for Mayor's Safety Commission.

Chicago, May 22, 1924.

HON. FRANK J. TOMCZAK,

Chairman, Mayor's Safety Commission.

Dear Sir:

Replying to your letter of recent date, in which you ask what procedure should be followed in order to utilize the appropriation for the Mayor's Safety Commission, we submit that the appropriation itself seems to point the way as to all essential details.

The appropriation reads as follows:

"For materials and office supplies required and ordered by the Chairman of the Commission, and such other expenses of operation as may be authorized by future orders of the City Council\$15,000.00"

The wording is such as to clearly indicate the intention of the City Council to enable you to procure anything in the nature of office supplies by sending in your requisition for same to the Department of Supplies. The provision in

Section 4 of the Appropriation Bill that the Comptroller and the heads of other departments, bureaus and offices of the City Government shall administer the amounts appropriated, has always been understood to mean that where an appropriation is made to an agency under a separate heading, as in this case, the head of such agency has the right to draw against the appropriation through vouchers signed by him, subject to the jurisdiction over all appropriations that is vested in the Comptroller.

There is some doubt as to the right of one not an officer of the City who is invested with such a function, but this is overcome by the control exercised by the Comptroller, who in such event assumes additional responsibility.

As to anything besides the office supplies required by your commission, there would have to be additional action on the part of the City Council before you can release money for the purpose. Such action can take the form of ordinances, orders or resolutions, and may even be evidenced by concurrence in your recommendation by vote on a motion to that effect.

Yours truly,

LEON HORNSTEIN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

**Revocation of Licenses—Power of Council To Pass on
All Applications and Revocations—Delegation of
Power To Executive Officer.**

May 23, 1924.

HON. JOSEPH O. KOSTNER, Chairman, Revenue Commission.

Dear Sir:

In response to the letter signed by the Secretary of the Revenue Commission, stating that the Commission wishes

to have an opinion covering three questions therein set forth, we submit the following:

All three of the questions asked relate to the issuance and revocation of licenses, and we will therefore briefly discuss the subject generally before answering the specific questions.

The authority of the City Council with respect to licenses is conferred by Clause 4, Section 1, Article V, of the Cities and Villages Act, which empowers the City Council "to fix the amount, terms and manner of issuing and revoking licenses." It is frequently claimed that such clauses as these give the City Council the right to assume executive functions, but such is not the case. While this grant of power gives the City Council full control over the granting and revocation of licenses which it is authorized to impose, the power is a legislative power and must be exercised in the manner prescribed by law.

The mode of corporate action on the part of the City Council where no permanent course of conduct is prescribed by it, may be either by ordinance, order or resolution (Art. V, Sec. 3), but the only way to give effect to the charter powers of the city is by ordinance. These charter powers do not otherwise come into play but lie dormant until put into effect by ordinance. The clause giving power to control the issuance and revocation of licenses (Clause 4) must be read in connection with Clause 100 of the same section, which is as follows:

"One-hundredth. To pass all ordinances, rules and make all regulations, proper or necessary, to carry into effect the powers granted to cities or villages, with such fines or penalties as the city council or board of trustees shall deem proper: *Provided*, no fine or penalty shall exceed \$200.00 and no imprisonment shall exceed six months for one offense."

Our Supreme Court has many times expressed this view. Among its decisions is found the following:

"Paragraph 7 of section 1 of article 5 of the City and Village act enumerates, among the powers of city

councils in cities, the power 'to lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve streets,' etc. Paragraph 96 (now 100) of said section 1 enumerates, among the powers of city councils of cities, the power 'to pass all ordinances, rules and make all regulations proper or necessary to carry into effect the powers granted to cities,' etc. Immediately following said paragraph 96 (now 100) is section 2, which specifies what shall be the style of an ordinance in cities. By the paragraphs and sections thus referred to, it is made clear that the common council is required to pass such ordinances, rules and regulations as are necessary to carry into effect the powers granted to the city, and that among these powers is that of grading the streets. Acts of the city, which have for their object the carrying into effect of the charter powers thus granted, are legislative in their character; and it is well settled, that acts of municipal corporations, which are legislative in their character, must be put in the form of ordinances, and not of mere resolutions."

C. & N. P. R. R. Co. v. City of Chicago, 174 Ill. 439-446.

In another case, where it elaborated on the same subject, the Supreme Court expressed itself even more fully in the following language:

"Among the powers conferred upon the city council in cities and the president and board of trustees in villages is the following: 'Twenty-seventh—To require railroad companies to keep flagmen at railroad crossings of streets.' The latter part of paragraph 62 (clause 100) empowers the city council in cities and the president and board of trustees in villages to pass all ordinances proper or necessary to carry into effect the powers granted. The Village of Altamont, the appellant, was organized as a village under the general law for the incorporation of cities and villages, and it could only exercise the powers conferred in the mode provided by the statute * * *.

"Under these two sections, where it may be necessary the city authorities are clothed with power to act. But the question arises, in what way may they act? Are the city authorities required to pass an ordinance in which it is determined that a necessity exists for a flag-

man at a certain railroad crossing and requiring the railroad company to place a flagman at such crossing, or may the city authorities, or a majority of them, meet and direct the marshal or some other agent of the city to notify the railroad company to place a flagman at a certain crossing? We think it is manifest that the city council can act only by ordinance. Acts of legislation by a municipal corporation which establish a permanent rule of conduct or government, and which are to have a continuing force and effect, must be established by ordinance.

"In *Chicago and Northern Pacific Railroad Co. v. City of Chicago*, 174 Ill. 439, the question arose whether the grade of a city could be established by a resolution, and in passing upon the question the court said (p. 445): 'A resolution or order is not a law, but merely the form in which the legislative body expresses an opinion. An ordinance prescribes a permanent rule of conduct or government, while a resolution is of a special and temporary character. Acts of legislation by a municipal corporation which are to have continuing force and effect must be embodied in ordinances, while mere ministerial acts may be in the form of resolutions. * * * Where the charter requires an act to be done by ordinance, or where such a requirement is implied, as it is here, by necessary inference, a resolution is not sufficient but an ordinance is necessary.' If an ordinance is required to establish the grade of a street, upon the same principle where the safety of the public requires a flagman to be stationed at a railroad crossing that should be done by ordinance."

Village of Altamont v. B. & Q. S. W. Ry. Co., 184 Ill. 47-50.

Again, it was said in another case:

"It has been said that acts of the city which have for their object the carrying into effect of the charter powers granted to the city are legislative in their character, and it is well settled that acts of municipal corporations which are legislative in their character must be put in the form of an ordinance, and not of a mere resolution."

Village of London Mills v. White, 208 Ill. 289-297.

To the same effect are *Claflin v. City of Chicago*, 178 Ill. 549; *People v. Mount*, 186 Ill. 560; *Lamm v. City of Danville*, 221 Ill. 119; and many other cases which might be cited, extending down to the most recent reports.

It follows from the above that while the City Council may perform purely ministerial acts and express its opinions in the shape of orders and resolutions, it cannot control the issuance and revocation of licenses in any other way than through the passage of ordinances prescribing the conditions under which they may be issued or revoked. These ordinances must conform to the constitutional and statutory requirements as to discrimination, reasonableness, etc.

The City Council cannot confer on an officer a discretionary power to grant or refuse a license as he sees fit (*City of East St. Louis v. Wehrung*, 50 Ill. 28; *City of Chicago v. Trotter*, 136 Ill. 430); nor can it reserve for itself such a power (*Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9-27). Whether it delegates the authority to issue or revoke licenses or reserves it for itself, the ordinance under which the power is exercised must be general in its operation and administered strictly in accordance with its terms. "The ordinance should have established a rule by which its impartial enforcement could be secured." (*Ibid.*)

If the City Council sees fit to retain within its own control the power to issue and revoke licenses according to the strict letter of its own ordinances, it has the undoubted right to do so. Thus, it was held in one of the cases cited:

"In the proper exercise of this power, the city council should adopt general ordinances, prescribing a general rule by which licenses might be obtained. They might, no doubt, prescribe the character of persons who might, or might not obtain licenses; or they might, in their regular or called meetings, in such manner as they might ordain, grant such licenses."

City of East St. Louis v. Wehrung, 50 Ill. 28.

Such retention of its power would mean, however, that the City Council would have to pass on every application for a license at its meetings and that if it refused to grant a li-

cense it would have to go on record by resolution to the effect that in its opinion the applicant does not come within the terms of the ordinance governing the issuance of such licenses. It would at least be difficult for the City Council to exercise its judgment within the bounds defined by the ordinance. It could not delegate such power to a committee, except for investigation and report. Final action in every case would have to be by the Council itself.

The practice up to the present time has been to delegate to an executive officer the right to decide whether or not an applicant is entitled to a license under the law. This method has been recognized as lawful in this state throughout its history. The following rule was laid down in 1848 and has been adhered to ever since:

“Necessarily, regarding many things especially, affecting local or individual interests the legislature may act either mediately or immediately. We see, then, that while the legislature may not divest itself of its proper functions, or delegate its general legislative authority, it may still authorize others to do those things which it might properly, yet can not understandingly or advantageously do itself. Without this power legislation would become oppressive, and yet imbecile.”

People v. Reynolds, 5 Gilman (10 Ill.) 13.

The Supreme Court has repeatedly quoted the last excerpt. It appears dozens of times in the printed reports, and the principle was re-affirmed as late as 1922 in the case of *Milstead v. Boone*, 301 Ill. 213, and perhaps even later. Hence, there is no doubt as to the propriety of delegating to an officer of the city the executive function of passing on applications for licenses and the exercise of the power of revocation in accordance with the provisions of an ordinance therefor. The only question is what kind of an officer such power can be delegated to.

Under the charter of the city the Mayor is its chief executive officer. (Cities and Villages Act, Art. II, Sec. 1.) It is expressly made his duty to see that the laws and ordinances are faithfully executed. (Art. II, Sec. 10.) Therefore

it will be his duty under any circumstances to enforce the ordinances relating to the granting and revocation of licenses. The Mayor has the power of appointment of all officers of the City except the two elective officers otherwise provided for by statute—Clerk and Treasurer. (Art. VI, Sec. 3.) Consequently, the Mayor will be the responsible head and controlling force in regard to these matters even though the specific duty were to be placed in the hands of some other officer, since the two elective officers are clothed with duties by statutes which cannot be materially altered.

The powers which may thus rightfully be delegated to the Mayor, or to another executive officer appointed by him and under his control, cannot be delegated to one who is not an officer, and it cannot be delegated to a legislative or judicial officer.

The only legislative officers of the city are the aldermen of the various wards, and the only judicial officers are the judges of the Municipal Court. These officers have their duties clearly defined by statute.

“Although the powers of government fall into the distinct departments of the legislative, executive and judicial, a municipal government embraces all of them. There is a legislative department, which ordains what the local laws shall be; the executive, charged with the duty of seeing that they are executed; and the courts in which they are construed, applied and enforced.”

People v. Olson, 245 Ill. 288.

Aside from any statute on the subject, such executive functions as we are here considering cannot be delegated to either an alderman or a judge. It would be creating a position utterly incompatible with either of the offices to provide that one who has the function of assisting in making the law should have the function of administering it, or that one who has the function of passing on violations of it should be the enforcing officer. In the case of an alderman there is an express provision against his holding such a position, by the clause reading, “nor shall any member of the City Council at the same time hold any other office under the city government.” (Art. III, Sec. 5.)

The City Council, therefore, must either exercise this function itself as a body, or it must delegate it to an executive officer.

By applying the principles set forth above, the questions your commission asks may be answered in categorical fashion, as follows:

1. Does the power to issue and revoke licenses lie with the City Council? Yes, it has the power to fix the amount, terms, and manner of issuing and revoking licenses, a power which must be exercised through the instrumentality of ordinances. It also has the power, if it sees fit, to retain for itself, as a body, the power to pass on applications for licenses and the power to revoke licenses, in strict conformity with the ordinances which it passes relating thereto.

2. Has the City Council delegated the power to issue and revoke licenses? Yes, the power has been delegated by the ordinances of the city to its executive officers. The manner of making application and the manner of issuing licenses is prescribed as to each license provided for; and the revocation is in many instances also specifically provided for in the ordinances providing for such licenses. In addition to these specific provisions, Chapter XLIV of The Chicago Municipal Code of 1922 contains the general provisions which apply in all cases where there are no such specific provisions. To change this status would require almost a complete revision of the code.

3. If the City Council has delegated the power to issue and revoke licenses, did it exceed its power in so doing? No, there was nothing improper or invalid in delegating the power to executive officers as it has done. It is in strict conformity with the numerous decisions of the Supreme Court, which say that without the power to do this "legislation would become oppressive and yet imbecile." Under the decisions quoted from, and in particular the rule laid down in *People v. Reynolds*, 5 Gilman 13, this was not only valid, but the logical thing to do.

We have elaborated the points we make as fully as we deemed it necessary to do, but if any further light is desired we will endeavor to go still farther in explaining our views.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Practice of Railroads of Allowing Cars To Stand on
Tracks Close to Building Line of Intersecting
Streets.**

May 26, 1924.

HON. THOS. F. BYRNE, Alderman, 15th Ward.

Dear Alderman:

We have your communication of the 21st inst., wherein you state that protests have come to you because railroad companies allow their cars to stand on tracks close to the building line of intersecting streets, thereby shutting off the view of the public using the streets of what transpires on adjacent tracks and which might be inimical to their safety.

Our ordinances fail to provide any restrictions upon railroad companies from making full use of their rights of way up to said building line. They therefore may utilize such trackage of theirs as they care to without restraint, subject, of course, to other regulatory ordinances.

However, under our police power, the point you raise can be construed as a necessary and reasonable precaution in the interest of public safety, and we therefore submit an ordinance amending Chapter LXVI (Railways) of The Chi-

cago Municipal Code of 1922, which will tend to correct existing conditions.

Yours very truly,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

When City May Not Settle Valid Claim Without Affecting Right of Action Against Bonding Company.

May 27, 1924.

HON. ROSS A. WOODHULL, Chairman, Finance Committee.

Dear Sir:

You have requested the Corporation Counsel for an opinion in regard to the claim of the Dunham Towing and Wrecking Company for repairs to the steamer "Paisley." The alleged accident occurred at the Canal Street Bridge, South Branch Chicago River, on August 6, 1921. The attached invoice of the Kraft Shipyard and Dry Dock Co. for repairs is for four hundred fifty-five (\$455.00) dollars.

This matter has been taken up with the Department of Public Works, Bureau of Rivers and Harbors, and the report returned by W. J. Lynch, Harbor Master, is to the effect that the accident was caused by the negligence of the bridge tender, Mr. A. Housley, in not opening the bridge to its full height. Under these circumstances, the probability is, that the city would be held liable for this claim, since it was acting in its proprietary capacity. However, the bridge tender, A. Housley, was bonded at that time for fifteen hundred (\$1,500.00) dollars by the Southern Surety Company, 208 East Ohio street. Should the city recognize or make any

payment on this claim or attempt to settle the same, it might seriously jeopardize its rights to proceed against the surety company for reimbursement.

This office, therefore, recommends that the Dunham Towing and Wrecking Company be notified that the Southern Surety Company was surety on the bond of the bridge tender at that time, and that they accordingly take up this matter with the said surety company, rather than with the City of Chicago.

Very truly yours,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Interpretation of "Through Street" Ordinance As Including Boundary Streets.

Chicago, May 28, 1924.

MR. J. LEO BULGER, Secretary, Mayor's Safety Commission.

Dear Sir:

We have your communication of the 24th instant, referring to complaints received by your commission to the effect that motorists using Western avenue fail to stop when they approach 111th street, designated by the City Council as a "through street," by virtue of the passage of an ordinance on March 14, 1923, C. J., p. 2044, reading as follows:

"That West 111th street, from Longwood drive to South Western avenue, be and the same is hereby designated as a 'through traffic street.'"

It is to be presumed that their failure to stop at 111th street is due to the assumption that the ordinance making

this street a "through street" does not specifically provide the inclusion of the boundary streets such as Western avenue and Longwood drive, and you wish our interpretation of the point whether the Council intended to include or exclude such streets.

We admit that this ordinance is ambiguous, and by referring to Section 2756 of The Chicago Municipal Code of 1922, which established the "through street" system we can receive no further enlightenment as to whether or not the City Council intended to include the bordering streets, but our opinion is that such was the intention.

However, that no doubt need be indulged in, and to preclude such a defense being advanced by violators which would leave the question to the court for final decision, it is suggested that the Code be amended to be specific in its meaning, and to that end we enclose an amendatory ordinance, which, if passed, will include termini streets excepting boulevards.

Very truly yours,

JAY A. SCHILLER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Rights of C., M. & St. P. Ry. Co. on Seminary Avenue
—Power of City To Grant Franchise—Expiration
of Same With Charter of Corporation—
Assignability—Estoppel of City.**

May 31, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Referring to an inquiry made by your Superintendent of Streets, Thomas F. Byrne, concerning the right and le-

gality of the use of Seminary avenue between Grace and Byron streets, by the Chicago, Milwaukee & St. Paul Railway Company for a team track and siding, we beg leave to advise you as follows:

Our search reveals that the original grant was passed and approved by the Board of Trustees of the City of Lake View on October 3, 1881, in the following manner and language:

“Grant—route.) Be it ordained by the board of trustees of the town of Lake View: Section 1. That permission and authority be and are hereby granted to the Chicago and Evanston Railroad Company to lay down, maintain and operate a single railroad track or double tracks, with the necessary switches and turn-outs, through the town of Lake View, on a route commencing at a point to be selected by said company in Fullerton avenue, on the south line of the town, between the east line of Southport avenue and a point six hundred (600) feet east thereof, and running thence northeasterly and north to a point on the north boundary line of the town, three hundred and thirty (330) feet east of the center of Evanston avenue; and in the course of said route to run in the street which runs from Wrightwood avenue to Lincoln avenue on the line midway between Southport avenue and Racine road (or avenue), and in *Stella street*, from Grace street (or Ivanhoe street), its present southern end, to the street known as Sulzer street (or Armadale road), its present northern end; and to cross all streets and alleys in said route. (Italics ours.)

Conditions — crossings — supervision.) Section 2.
* * *

Motive power—subject to ordinances—rights reserved.) Section 3. * * *

Extension of streets—crossings.) Section 4. * * *

Repair of tracks and crossings.) Section 5. * * *

Indemnity.) Section 6. * * *

Bond—conditions.) Section 7. * * *

Time for completion limited.) Section 8. The privilege and authority hereby granted are so granted upon the further express condition that the tracks authorized by this ordinance shall be laid down and constructed, and said railroad shall be regularly operated by *running daily passenger trains* over the same within one year

from the passage of this ordinance; and if not so constructed and in operation, all the rights and privileges granted by this ordinance to such company shall cease and be null and void." (Italics ours.)

In order to clarify matters and to connect this ordinance with the question you raise, it is well to state at this point that the Chicago and Evanston Railroad Company consolidated on December 2, 1890, with the Chicago and Lake Superior Railroad Company under the name of The Chicago, Evanston and Lake Superior Railway Company, which latter company later merged with The Chicago, Milwaukee & St. Paul Railway Company; that the City of Lake View became part of the City of Chicago by annexation on June 28, 1889, and that Stella street is now known as Seminary avenue.

Seminary avenue is only one of a system of streets affected by this ordinance and therefore in determining the status of this ordinance, we mean to embrace all streets included therein.

It is well here to determine what actually passed from the municipality to the railroad company by virtue of the passage of this ordinance. We find it to be nothing more than a license. The State never delegated to a municipality the power to grant charters or franchises, and it is a well defined principle of law that a municipal corporation can exercise only those powers that were specifically conferred upon it. In the case of *The Chicago City Railway Company v. The People ex rel.*, 73 Ill. 541, 548, the Court said:

"The grant or license given by the ordinance comes within no definition of a franchise. Besides, a municipal body, it is understood, possesses no power to confer a franchise. *Davis v. The Mayor*, 4 Kernan, 506. * * *

"It is a misconception of the law to suppose the railway company derives its power to construct a railroad from any ordinance of the city. All its authority is from the State, and is conferred by its charter. The City has delegated to it the power to say in what manner and upon what conditions the company may exercise the franchises conferred by the State, but nothing more."

Having determined that the grant is a limited one, a mere license, the question naturally follows, what is its scope? Does the license embrace broad enough power to include the operation of a team track and siding when limited to the use for passenger trains? We are not ready to say that freight trains can be kept off the tracks if the needs of the public are served by such usage, but where, as in this case, the license specifically provides for the "running of daily passenger trains," the right does not rest with the railroad company to change the purpose of the grant. It is one of the cardinal principles of all legislative interpretations and construction that a legislative act purporting to confer a public right or privilege to a private person must be construed strictly. This principle is well propounded in *Knoxville Water Company v. Knoxville*, 200 U. S. 22, where it is said:

"As late as *Coosaw Mining Co. v. South Carolina*, 144 U. S. 550, 562, this court said: 'The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises or privileges in which the Government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; *nothing passes by mere implication.*' We have never departed from or modified these principles, but have reaffirmed them in many cases." (Italics ours.)

Applied to the facts here, this statement of the law shows conclusively that the constructive intent and purpose of the Board of Trustees of the City of Lake View was to give to its citizens better passenger accommodations for those who traveled on the Chicago and Evanston Railway Company. Changes in the neighborhood, whether in character, complexion or needs of the people cannot alter or affect that original intent and purpose, and cannot widen or extend the horizon of the grant in question.

Abbott in his book on Municipal Corporations, Vol. III, Sec. 852, expresses the same opinion:

"The rules of interpretation or construction to be applied in a particular instance will depend upon the

nature of the grant. If this is one exclusive in its character or in derogation of common right, the rule of strict construction will apply and *no privileges not clearly appearing* will be read into the instrument through an application of the principle of implied powers. (Italics ours.)

Hopkins v. Baltimore & P. R. Co. (6 Mackay, 311). The authority granted a railroad corporation to lay its tracks in the City of Washington does not authorize the use of the public streets for general yard purposes."

The situation narrows then to a view that no matter how unprofitable the maintenance of passenger service there may be under present circumstances, and vice versa, how lucrative freight service may be, no change can be made by the railroad company under the exercise of the original grant.

It is true that the railroad company in order to maintain its freight service under this license will find it to its benefit to run a passenger train over this section of its right of way to be in technical compliance with the ordinance. But the fact remains that by reason of the neighborhood traversed by this section of the railroad having changed during the half century of its existence from a residential district in need of passenger service to a commercial district requiring freight service, a new ordinance will necessarily have to be passed permitting of this change in order that the company may not be placed in the position of using public property without proper and legal authorization.

We will now address ourselves to the proposition of whether or not the continuance of the grant can extend beyond the life of the original grantee—the Chicago and Evanston Railway Company. The United States Supreme Court left not a shadow of a doubt upon that proposition. Bearing in mind that the charter of the Chicago and Evanston Railway Company gave it corporate existence on February 16, 1861, for a period of fifty years, its termination, (if a merger with the Chicago and Milwaukee & St. Paul Railway Company had not intervened) was effected in the year 1911. The case of *St. Clair County Turnpike Co. v. Illinois*, 96

U. S. 63 (Aff'g 82 Ill. 174) fully covers the point. We read:

“No term was expressed for the enjoyment of this privilege; and no conditions were imposed for resuming or revoking it on the part of the State. It cannot be presumed that it was intended to be a perpetual grant; for the Company itself had but a limited period of existence. At common law, a grant to a natural person, without words of *inheritance*, creates only an estate for the life of the grantee; for he can hold the property no longer than he himself exists. By analogy to this, a grant to a corporation aggregate, limited as to the duration of its existence, without words of perpetuity being annexed to the grant, would only create an estate for the life of the corporation. * * *

The fair construction, then, as we think is, it was designed the corporation should have the use of the bridge and dike, with the right to charge tolls thereon, until the period fixed for the termination of the corporation existence and no longer.”

Moreover, it is a very prevalent and well recognized proposition of law that when a corporate life ceases, whether by limitation of its charter, operation of law, or forfeiture, all its specifically granted powers and licenses terminate unless continued by special provision for succession or assignment. But no power of succession or assignment is given in the grant in question; and the present claimant—the Chicago, Milwaukee and St. Paul Railway Co.—is a successor only to such rights of the original grantee—the Chicago and Evanston Railway Co.

We look further and find also that the charter rights granted by the State to the present holding company, the Chicago, Milwaukee & St. Paul Railway Company, expired, after its fifty years franchise, on April 3, 1922. All rights and privileges granted by our State and its political subdivisions would expire with its franchise forfeiture. It is, however, true that this company transacts business in this State by filing annual reports and paying its taxes as a corporation of a foreign State. Yet it is not to be presumed that where there is no time limit contained in a grant given to a corporation having limited corporate existence and issued

upon the basis of such limited existence, such corporation can defeat the purpose of the law by subsequently incorporating in another state, paying its just tax here, and thereby claiming the continuation of rights and privileges which were originally granted here upon the theory that such rights would be extinguished when its corporate existence terminated. There would be no final determination to such grants, for the liberal laws of other states could not contemplate local conditions.

If the previous propositions do not sufficiently show that the Chicago, Milwaukee and St. Paul Railway Co. cannot devote Seminary avenue to the use now made by it, then, we come to yet another proposition which should avoid any further discussion. Explicitly stated, the disappearance of the City of Lake View as an independent municipality marks the nullification of its grants. This is well pointed out in 201 U. S. 400, *Blair v. Chicago*:

“The question remains as to the term for which the rights granted by the trustees and the municipality of Lake View were to be held. The ordinances making these grants required the company to perform certain duties to the municipalities, such as the laying of pavement, subject to the approval of the trustees. On April 16, 1887, the incorporated town of Lake View became incorporated as the City of Lake View under the Cities and Villages Act of 1872. *On July 15, 1889, the territory included in the City of Lake View was annexed to the City of Chicago.* We think in such case that the terms granted would not extend beyond the life of the corporation conferring them *where there was no attempt to confer a definite term, assuming, without deciding, that it was within the authority of the municipality to grant a perpetuity.*” (Italics ours.)

Again, we find, this proposition was clearly decided in the following case:

“In *People v. Chicago Telephone Co.*, 220 Ill. 238, it was held that where the corporate authorities of towns or villages had granted rights to public service corporations to occupy their streets and no time was fixed when such rights should cease, such rights did not exist in perpetuity, but that they would cease to exist when the

municipalities granting such rights ceased to exist, as the village of Hyde Park and the town of Lake ceased to exist, by annexation to the City of Chicago."

(*Venner v. Chicago City Ry. Co.*, 236 Ill. 349, 357.)

We do not find any legislation enacted by the City Council of the City of Chicago which made original grants to the users of the railroad rights of way nor was there any ratification of the old grant.

The point may be advanced that the City having failed to press its rights to the street space for so long a period, is estopped from now doing so. For the purpose of this opinion we need not concern ourselves when the City could have exercised its legal right to oust the railroad company from its streets, whether it should have been upon the cessation of the existence of the municipality; whether it should have been at the time the original grantee merged with another road; whether it should have been upon the expiration of the charter rights granted by the State of the present holding railroad company, or whether it should have been terminated at the time of its failure to run daily passenger trains, because the doctrine of estoppel cannot effect a municipality where public and not private rights are involved.

To summarize our conclusions, we find that by no construction possible was the grant more than a mere license, giving no more than an easement and no other right in the land.

Furthermore, the grant being for the promotion of public welfare, the necessity for which has under changing conditions ceased, the municipality is relieved from its obligation to widen or extend the scope of the grant.

Additionally, no reservations were included saving either an assignment or succession and neither can possibly be made.

And to further cumulate the reasons against permitting any continued exercise under the grant for the purposes of freight service; i. e., the absorption by the City of Chicago of the original *grantor*, the City of Lake View, as well as the merger of the grantee, we are of the opinion that the Chicago, Mil-

waukee and St. Paul Railway Co. is now unlawfully using the streets mentioned in said ordinance for its right of way, and you are at liberty to inform said company to remove all obstructions from, in and upon the public land described in the ordinance.

It may be, however, that due to the long period of time these tracks have occupied the streets that commercial institutions along such route will suffer tremendous hardships if service was preemptorily stopped and it may also be that the community might suffer because of the effect of such a course upon those served by the railroad on this right of way. Further, the Interstate Commerce Commission may refuse to allow the railroad company to abandon this branch of its system, and for these reasons it would probably be better to have your engineers check up all the space in public streets made use of through this ordinance and its amendments, and recommend to the Department of Compensation the passage of a compensatory ordinance for the use of all such public space.

In the event the railroad company fails to negotiate along the lines outlined, it will be incumbent upon this office to commence ouster proceedings to enable the courts to determine the question involved.

Very truly yours,

JAY A. SCHILLER,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,

Corporation Counsel.

Equipment of Motor Busses with Mirrors.

June 3, 1924.

HON. FRANK J. TOMCZAK, Chairman, Mayor's Safety Commission.

Dear Sir:

We have your letter of the 23d ult., to which was appended copy of letter addressed to His Honor the Mayor,

by Martin J. Isaacs with reference to the apparent violation of motor bus operators in failing to attach mirrors to their busses as required under Section 211A of the Motor Vehicle Statute.

Please be informed that the point Mr. Isaacs raises is well founded and busses are required to be equipped with mirrors.

The second inquiry of Mr. Isaacs meets with the response that boulevards in the city are under the control of the respective park boards and they have in force ordinances prohibiting trucks from using the boulevards.

The reason Mr. Isaacs failed to find reference to trucks in the booklet he referred to in his letter is because he overlooked the paragraph printed on page 2 thereof reading as follows:

“Commercial Vehicles, Taxicabs, etc.—Special regulations governing commercial freight-carrying vehicles, taxicabs, etc., as distinct from vehicles used for non-commercial purposes, are not included herein.”

Very truly yours,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Procedure When Motion Picture Exhibitors Refuse To Delete Motion Picture Films After Obtaining Permit.

June 6, 1924.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

In response to an inquiry instituted by Alice M. Miller, Censor in Charge, Motion Picture Censor Board, with refer-

ence to our interpretation of Section 2790, with respect to the failure of exhibitors to delete certain films as ordered, we desire to say the following:

This section of The Chicago Municipal Code of 1922 relates only to motion picture plates, films, etc., where permit has been *refused*, and cannot be considered in the same light as your proposition, that is, where permit was *issued* upon the condition of certain deletions being made.

The remedy in a situation where bad faith has been shown by the permittee would be in your revocation of such permit, thereby nullifying its existence and in event of the continuation of the exhibition of such film, then and in that case you would be within your legal rights to confiscate the film and cause such other penalty to be inflicted as is prescribed by said section.

Very truly yours,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Expenditure of Funds Derived from Vehicle Tax Fund.

June 6, 1924.

HON. ROSS A. WOODHULL, Chairman, Finance Committee.

Dear Sir:

You turned over to us a letter from the Illinois Automobile Club relating to appropriations made from the Vehicle Tax Fund which was originally addressed to the Commissioner of Public Works and by him referred to you. You ask for an opinion as to the rights of the City to expend this fund in the manner named in the communication.

Upon reading the letter we find that it deals more particularly with the amounts appropriated for the different purposes, rather than with the right to appropriate for such purposes. In this respect it seems to raise no legal question at all, unless the assertion to the effect that the law places the handling of the fund in the Commissioner of Public Works requires an answer, since there is nothing in the law to that effect.

The authority to collect the license fees which go to make up the Vehicle Tax Fund is derived in the first instance from Clause 96, in Section 1, Article V, of the Cities and Villages Act, which reads as follows:

“Ninety-sixth. To direct, license and control all wagons and other vehicles conveying loads within the city, or any particular class of such wagons, and other vehicles, and prescribe the width and tire of the same, the license fee when collected to be kept as a separate fund and used only for paying the cost and expenses of street or alley improvement or repair.”

This provision was held valid in the case of *Harder's F. P. V. & S. Co. v. City of Chicago*, 235 Ill. 58. It relates to all classes of vehicles, horse drawn as well as automotive.

From the very start, this provision was construed as authorizing necessary disbursements for purposes of collection, distribution, and other expenses, as in the case of special funds derived from bonds, deposits of traction companies, etc. This principle was never applied to the many incidental expenses which naturally arise in the handling of so large a fund, as was the practice with the water fund, when every department—law, finance, and all the rest—has part of its expenses defrayed by appropriations from the water fund.

After the passage of this provision the General Assembly in 1911 passed a Motor Vehicle Act which had the effect of limiting this power of the City to some extent with respect to pleasure motor vehicles, but not as to commercial vehicles or horse drawn vehicles. It is not necessary for the purposes of this opinion to go into this matter with exactness, but we mention it in order to show the reason for the provi-

sion which appears in Section 26 of the Motor Vehicle Act (Cahill's Rev. St., 1923, p. 2336), which we do not regard as the original source of the power to tax, but which removes the obstacle against enforcing the City tax on pleasure motor vehicles, so that the City again has the right to enforce its vehicle license ordinance as to this class of vehicles as well as all others. It authorizes the City to collect a tax of \$10 for motor bicycles or motor vehicles of 35 horse power or less and \$20 for vehicles of more than 35 horse power.

Embodied in this last mentioned provision of the Motor Vehicle Act, there is included the following:

"The proceeds of all fees so collected by any city, town or village shall be used for the purpose of improving, paving, repairing or maintaining the streets and other public roadways within such city, town or village and shall never be devoted to any other use whatever: *Provided*, that the actual cost of the collection of such fees and the disbursement thereof may be deducted from the total amount collected."

It will thus be seen that the Legislature expressly sanctioned the deduction of expenses of collection and disbursement. Therefore, the fund may be used for improving, paving, repairing, or maintaining streets and alleys, after there is deducted therefrom the expenses of collection and disbursement.

The letter of the automobile club, referred to above, does not seem to question the purposes for which the appropriations about which it complains are made, but the amount thereof. With the amount we have nothing to do, because that is peculiarly the business of the City Council. Yet, since you have placed the whole matter before us, we will make a few observations concerning these appropriations.

The total estimated amount to be collected is \$3,605,680. Of this, \$527,295 (after deducting \$100,00 for bridge and viaduct pavements), or about 14 per cent, is appropriated for other purposes than actual administrative and practical work on the streets themselves. This does not seem an ex-

cessive amount, and it becomes more and more reasonable as you analyze it.

Among the complaints made is that the sum of \$102,760 is for the City Clerk's office. But over \$60,000 of this is for license plates and printing. Of the appropriations to the Department of Gas and Electricity objection is made to \$125,000 for installing lights, which are unquestionably of great advantage to motorists—in fact we do not understand that the complaint as to this amounts to more than a suggestion to go slow before using the money. The only other item complained about is the amount applied to the Department of License, concerning which we have no means of basing an opinion, and which, in any event, is not a matter for us to pass on. We have already stated that the expression concerning the Commissioner of Public Works being the person to handle the fund is a mistake on the part of the writer of the letter, because there is no such provision in the law.

We return the letter of the Illinois Automobile Club and that of the Commissioner of Public Works herewith.

Yours very truly,

LEON HORNSTEIN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

**Use of Powers Granted Civil Service Commission To
Subpoena Witnesses in Connection with Investi-
gation of Fire Department by City Council.**

June 7, 1924.

ALDERMAN GUY GUERNSEY, Council Chambers, City Hall.

My dear Alderman:

His Honor, Mayor Dever, has referred to me your letter to him of the 4th instant, suggesting that the committee in-

vestigating the Fire Department, of which you are chairman, might avail itself of the powers given in the Civil Service Act, particularly to compel the production of books and papers and the attendance and testimony of witnesses.

Section 12 of the Civil Service Act relates only to the removal of employes from the classified service, and obviously could not be availed of in the situation suggested.

Section 14 of the Civil Service Act is as follows:

“Sec. 14. Investigations. The commission shall investigate the enforcement of this Act and of its rules, and the action of the examiners herein provided for, and the conduct and action of the appointees in the classified service in its city, and may inquire as to the nature, tenure and compensation of all offices and places in the public service thereof. In the course of such investigations, each commissioner shall have the power to administer oaths, and said commission shall have power to secure by its subpoena both the attendance and testimony of witnesses, and the production of books and papers relevant to such investigations.”

Under this section, I have no doubt that the phrase, “conduct and action of the appointees in the classified service” is sufficiently broad to justify an investigation into the entire conduct of the Fire Department, inasmuch as all of the employes thereof are necessarily members of the classified service, with the exception of the Head of the Department.

Upon reference to the statute, you will notice that Section 12 specifically provides that charges against an employe in the classified service shall be investigated, “by or before said Civil Service Commission, or by or before some officer or board appointed by said commission, to conduct such investigation, while Section 14 provides, “that the commission shall investigate the enforcement of this Act,” etc., and makes no provision for the appointment of an officer or board to act in the place of the commission. That it was the evident intent of the legislature to limit investigations under Section 14 to such investigations as should be conducted by the commission, is further manifested by the last sentence

of the section, which provides, "*that each commissioner shall have power to administer oaths, and said commission shall have power to secure by its subpoena both the attendance and testimony of witnesses, and the production of books and papers relevant to such investigations.*"

In view of the above, it is my opinion that the Civil Service Commission, of their own motion, might undertake an investigation of the conduct and action of the appointees in the classified service in the Fire Department, and in the course of such investigation, each Commissioner has the power to administer oaths and issue subpoenas to compel the attendance and testimony of witnesses and the production of books and papers, but that no power is given in the Civil Service Act to the commission to delegate this power to any other officer or board.

Trusting that this answers your inquiry, I am,

Very truly yours,

FRANCIS X. BUSCH,
Corporation Counsel.

Right of Civil Service Commission To Classify Police Messengers as Police Operators.

June 9, 1924.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

My dear Alderman:

I beg to acknowledge receipt of your letter of the 5th instant, making inquiry as to the right of the Civil Service Commission to classify three men now working as Police Messengers as Policemen.

I have investigated the Civil Service records in this matter and have also talked with Mr. William F. Foehringer,

Secretary of the Civil Service Commission. The records disclose that these men took both a physical and mental examination and that the questions in the mental examination were the same kind and character of questions that are usually asked in examinations for patrolmen. The physical examination was not the same physical examination which is required of applicants for patrolmen.

In the opinion of Mr. Foehringer there is a sufficient similarity in the duties of police-operators and the duties heretofore performed by messengers and supply carriers to justify the assignment of these men as police-operators. The character and scope of the examinations for messengers and supply carriers and police-operators are so nearly identical in his opinion as to also justify this course.

There is at the present time no eligible list for police-operators. On the other hand, I am informed that there are fifteen appointees working as police-operators on temporary authority. While it may not be in strict accordance with the letter of the Civil Service Law to certify these men as Civil Service police-operators, I am of the opinion that the physical and mental examinations heretofore taken by these messengers and supply carriers and the similarity of the duties in the two positions would justify their present classification as police-operators. This, I think, is particularly justified in view of the fact that these men have been members of the classified service for a number of years and contributed to the police pension fund.

In conclusion, therefore, I am of the opinion that the Civil Service Commission would be justified in certifying these three men as police-operators.

Yours respectfully,

FRANCIS X. BUSCH,
Corporation Counsel.

Whether Concerns That Rent Vehicles to Business Houses Should be Classed as "Public Carters."

Chicago, June 9, 1924.

WM. J. CONNORS, Esq., Superintendent, Department of License.

Dear Sir :

Some time ago you referred to this department a letter from a firm of lawyers which was addressed to the Chairman of the Committee on Finance, in which the question was raised whether concerns that rent vehicles to business houses came within the definition of public carters, under Section 3984 of The Chicago Municipal Code of 1922. The section in question has been amended since then, but not with respect to the matter inquired about.

It is represented that the teaming concern owns a large number of auto trucks which are used for hauling various commodities for several business houses under contracts made with them; that these trucks are not subject to the call of the general public; and that there is no distinction between such use of a truck, and the use of a truck by a private concern for its own hauling, which warrants the classification of the teaming concern as a public carter.

While there is some point in the argument used as indicating that there might properly have been an exception made when the ordinance was drafted, there is no doubt whatever as to the meaning of the ordinance or the intention of the City Council.

Section 3984 provides that every such auto truck which is employed for the purpose of transporting merchandise shall be deemed a public cart, whether hired from a public stand, or from a public street or public way, or from a private barn or other private place, and whether hired by the day, week or month. This in itself seems to cover every

point made in the letter above referred to, but there is at least another sentence which repeats or emphasizes the language used. Said sentence is as follows:

“It shall be immaterial in determining the character of any vehicle whether the driver or person in charge and control of any such vehicle solicits custom or accepts employment therefor from any private office or private place by the day, week or month, or from or along any street or public way in the city.”

If there were any doubt as to the language which precedes this sentence, the words quoted dispel the doubt. It is quite clear to us that the parties referred to must be classed as public carters.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Status of Wood Street Between 74th and 75th Streets
—Vacation of Street by Purchase of Surrounding
Land by U. S. Government.**

June 9, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Your have requested the Corporation Counsel for an opinion relative to the City's rights, if any, in Wood street between 74th and 75th streets, and what action should be taken by the City to preserve such rights.

An investigation of the status of Wood street between 74th and 75th streets, reveals the following facts:

The Belt Railway is located running east and west between 74th and 75th streets in the vicinity of Wood street. At that location, there was formerly no passage, street or thoroughfare under the railroad for about three-quarters of a mile. To remedy this situation, a condemnation suit was begun about twenty years ago for the purpose of opening a viaduct under the railroad tracks at Wood street, in order to provide for the opening of Wood street, between 74th and 75th streets through the railroad. Pursuant thereto a viaduct was constructed under the tracks, but Wood street was never paved. It remained a dirt thoroughfare leading under the tracks. On June 24, 1918 (C. P. p. 465), the City Council passed the following order:

“Ordered, That the Commissioner of Public Works be and he is hereby authorized and directed to issue a permit to temporarily close and use Wood street between the south line of 74th street and the Belt Line Railway, for work of the United States Government, said permit to continue during the period of the war.”
On July 8, 1918, the following permit was issued:

“City of Chicago,
Department of Public Works,
Bureau of Streets.

July 8, 1918.

Permission is hereby granted to the Symington Chicago Corporation to close to traffic Wood street from 74th street to 75th street (Belt Railway) during the duration of war pending C. O.

The Department Reserves the Right To Revoke this at Any Time.

Signed F. S. MITCHELL,
No. 75030 Superintendent of Streets.”

Under authority of that permit the Symington Chicago Corporation erected factory buildings designed for the manufacture of war equipment in and across Wood street. These buildings form part of the plant known to the United States War Department as the Chicago Ordnance Storage Depot. The buildings are very large and very expensive, and are placed directly across Wood street, just north of the railroad tracks, in such a way as effectively to close the street.

On November 28, 1919, the United States of America bought practically all of the tract of land bounded on the east by Ashland avenue, on the south and west by the railroad tracks, and on the north by 74th street. This deed was given by the Chicago Title & Trust Company and was recorded in the office of the County Recorder of Cook County, Doc. No. 6701955, Book No. 15676, page 423. On December 7, 1922, the United States Government, having decided to sell this land, it being no longer needed for war purposes, an auction sale was held. At this sale, the Ashland Industries Corporation was the highest bidder. A contract was thereupon entered into and was signed by the aforementioned corporation and by the United States of America on March 19, 1923. This contract for the sale of the aforementioned property, provided for various deferred payments, the last coming due on December 31, 1930. It was further provided that until the last payment was made, the title thereto should remain in the United States of America. This contract has never been recorded, but we have been permitted to inspect the same through the courtesy of the lawyers representing the Ashland Industries Corporation.

The question to be considered is, whether the City, under the aforementioned statement of facts, has any rights in Wood street between 74th and 75th streets, and, if so, whether it can require the removal of buildings thereupon which obstruct Wood street. The permit issued by the Department of Public Works, was only issued for the duration of the war, and consequently no rights could have been acquired under it which would in any wise estop or effect the City at the present time. Furthermore, the permit has expired by its own limitation.

However, there is a statute in the State of Illinois, entitled, "An Act to cede jurisdiction to the United States over certain land, and for the purchase and condemnation thereof," approved and in force December 14, 1871, in which it is provided as follows:

"Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly:

That the United States shall have power to purchase or condemn, in the manner prescribed by law, upon making such compensation therefor, any land in the State of Illinois required for custom-houses, arsenals, light-houses, national cemeteries, or for other purposes of the government of the United States."

"Section 4. That in case there shall be any street or alley running through any block or tract of land so purchased or acquired by the said United States for any of the purposes described in the said Act hereinbefore set forth, all that portion of such street or alley within such block or tract of land, shall, upon the purchase of the same by the United States, or the transfer of the same to the United States by condemnation or otherwise, for any of the purposes aforesaid, be and the same is hereby vacated and closed, and the lots or tracts of land abutting upon any such street or alley shall extend to the center line thereof, and vest in the said United States, and become the property thereof, with full right, power and authority to use, occupy and enjoy the same as its own property in fee, to the same extent as though the same had never been used or occupied as a street or alley; and the said Act, to which this is an amendment, shall apply to the said portion of such street or alley so vacated to the same extent as to the block or tract of land so purchased or to be purchased or condemned for any of the purposes aforesaid."

According to the provisions of Section 4 of the aforequoted statute, if the United States of America purchases a tract of land, and a public street runs through said tract, it is thereupon vacated and closed, and the fee in said street vests in the United States. By the authority of this statute, as soon as the United States bought this tract of land, Wood street, from the railroad to 74th street, was at once vacated and closed, and the fee in said street vested in the United States of America. Since the United States acquired the fee in said street, it acquired all rights in that portion of land including the right of alienation. Therefore it had the right to sell any portion of this tract of land including the street or any portion thereof, to a private person or corporation. Therefore, according to the aforequoted statute,

as soon as the United States acquired this tract of land, Wood street was vacated and no public rights remained therein.

The constitutionality of this statute has never been before our Supreme Court, or the United States Courts. However, it is doubtful whether the courts would be inclined to hold the said act unconstitutional, in view of the holding of our Supreme Court in *Prall v. Burckhardt*, 288 Ill. 19. Therefore, we are of the opinion that all public rights in that section of Wood street lying between the railroad tracks aforesaid and 74th street have been lost. We are, furthermore, of the opinion that a condemnation suit to reopen Wood street at this point cannot be maintained until the year 1930, since the title is in the United States of America until that time, unless a special act of Congress is obtained giving permission to make the United States a party to such a proposed suit. The situation is unfortunate, in that the City is deprived of a public street in a location where it is highly desirable that a street should exist. However, the mere fact that an undesirable statute has been passed by the Legislature, is not grounds upon which a court can hold it invalid. We are constrained to hold that the City and the public have lost their rights in Wood street between 74th street and the aforementioned railroad right of way, by virtue of the aforementioned statute.

Yours very truly,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Whether Telegraph Companies Are Obligated To Pay City Compensation for Unoccupied Ducts.

June 11, 1924.

HON. LEO WINIECKI, Commissioner of Public Service.

Dear Sir:

We have your request of the 4th inst., for an opinion relative to the legal status of telegraph companies operating in Chicago under Article I, Chapter 81 of The Chicago Municipal Code of 1922. We understand this request to concern merely the question of compensation paid by the companies to the City.

Section 3802 of the Code provides:

“For such underground wires, cables, conduits, and appliances used in the electrical or physical dispatch of telegraph messages, such companies shall pay annually seven-tenths of a cent per lineal foot whether in main lines or laterals, traversed underground by any single duct containing wire, cable or other appliances, and the amount of the fee to be paid for conduit shall be obtained by multiplying the number of ducts in such conduit by the preceding fee for single duct, and in addition thereto, one-tenth of a cent per lineal foot for wire or cable placed underground but not contained in a duct or conduit and for all other appliances or instrumentalities, the fee shall be the same as that charged for single duct.”

On January 5, 1920, the City Council by resolution directed the Commissioner of Public Works to refuse the issuance of any permits of any nature to the Postal Telegraph Company for the erection of poles, the stringing of wires, the tearing up of streets or for the doing of any other work in the City of Chicago for which a permit is required until such time as the Postal Telegraph Company shall have paid in full all compensation due the City of Chicago from said company under the terms of the ordinance quoted. It ap-

pears that the City Council in passing the resolution was of the opinion that compensation should be paid by the Telegraph Companies according to the amount of footage of underground ducts whether occupied or unoccupied by wires. Subsequent to the passage of this resolution the Commissioner of Public Works refused to issue permits for certain construction and improvements contemplated by the Company. Thereafter on March 22, 1920, the company filed a bill in the United States District Court for the Northern District of Illinois praying that an injunction issue restraining the City, its officers and agents from interfering with or preventing the construction and improvements the company sought to make and for which they were denied a permit and praying the court to decree the ordinance in question to be wholly null and void and of no force and effect whatsoever. This squarely presented to the court the issue whether compensation should be paid on ducts whether occupied or unoccupied or whether compensation was payable merely on occupied ducts. The District Court held the ordinance valid and entered an interlocutory decree ordering that the injunctions prayed for issue, and the court retained jurisdiction of the cause for the purpose of stating the account between the parties and entering a final decree against the company and in favor of the City for such amount as might be found due upon the statement of the account. Subsequently a final decree was entered stating the account and containing the following provision:

“That the basis for such accounting, as to the amount of compensation due from the complainant to the defendants under the terms of the ordinance of the City of Chicago, last July 8, 1918, is upon the basis that the payment by the Telegraph Company for underground conduits and ducts shall be upon occupied conduits only, and that no provision is made in said ordinance for the payment of compensation upon unoccupied ducts.”

You will notice from the quotation that the court held that compensation was due only on occupied ducts. From this decree the City prosecuted an appeal to the Federal Circuit Court of Appeals and relied for reversal on the sole

ground that the trial court erred in holding that the company was not liable to pay compensation for unoccupied ducts. This was the only issue on appeal. On April 18, 1923, the Circuit Court of Appeals filed its opinion affirming in all respects the decree of the trial court. After a consideration of the record and briefs filed by the Circuit Court of Appeals and the opinion of that court, this office was of the opinion that it would be unavailing to prosecute an appeal from the order of affirmance of the Circuit Court of Appeals to the United States Supreme Court. You are therefore advised that it has been judicially and finally determined that telegraph companies are liable to pay to the City compensation for occupied ducts only.

Yours very truly,

J. J. COUGHLIN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Right of Widow To Pension When Marriage to Pensioner Took Place After He Was Retired on Pension.

June 11, 1924.

MR. GEORGE C. SIKES, Secretary, Policemen's Annuity and Benefit Fund, City Hall, Chicago.

Dear Sir:

Replying to your letter of June 5, 1924, relative to the pension rights of Cynthia Pennell, widow of Andrew J. Pennell who was placed on pension December 1, 1889, who was married to Cynthia Pennell on April 13, 1899, and who died April 17, 1917, I submit the following:

The Act of 1889, which was in force when Andrew J. Pennell went on pension, provides in Section 3 of said Act, that after the decease of such member of the Police Depart-

ment who had been placed on pension, his widow, or minor child or children under sixteen (16) years, of such deceased husband or father, if any survive him, shall be entitled to the pension provided for in this Act until such widow remarries.

The provisions of the Act of 1889 remained unchanged until 1903, at which time the legislature, in Section 6 of the Act of 1903, enacted the following provision:

“And, provided further, that whenever any member of the police force of such city, village or town, has been retired after twenty years’ service, or physically disabled, shall then marry, such wife or child or children of such marriage shall, after his death, receive no pension from said fund.”

At the time of the marriage of Andrew J. Pennell and Cynthia Pennell in 1899, Cynthia Pennell acquired a right in expectancy to a widow’s pension under the Act of 1889, which was then still in force and effect, but our Supreme Court (*Beutl v. Foreman*, 288 Ill. 106; *Hughes v. Traeger*, 264 Ill. 612) has held that the right to a pension is not a vested right and that the legislature can change conditions any time before a pension is granted and the new conditions will apply in all cases where a pension has not already been allowed.

The legislature in 1903 changed the conditions relative to the right of a widow to a pension by requiring that the marriage shall have occurred before the pensioner was placed on pension, and Mrs. Pennell was thereby deprived of the right in expectancy which had theretofore been hers. Marriage prior to retirement on pension is now a condition precedent to the granting of a pension to a widow, and has been such since 1903.

I am of the opinion that Mrs. Cynthia Pennell is not entitled to any pension under the law.

Respectfully submitted,

GEORGE F. MULLIGAN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,

Corporation Counsel.

Liability of City for Damages for Flooding Basement.

June 12, 1924.

HON. ROSS A. WOODHULL, Chairman, Finance Committee.

Dear Sir:

In accordance with your request of May 16, 1924, regarding the claim of Theron N. Ellings, Inc., for compensation for damages to shoes stored in the basement of the building at 80-82 East Randolph street which had been flooded, we submit herewith our opinion as to the City's liability.

The facts, as presented in the reports of the Water Pipe Extension Division and the Law Department's Investigator, indicate that the basement was flooded on three separate occasions, viz: April 11th, May 1st, and May 2d.

The law is well established, that:

"The distribution of water to its inhabitants for profit by a City is a purely commercial transaction. It is well established therefore that a municipality is liable for the negligence of its employes, in connection with its water department, as it is acting in its private, as distinguished from its governmental capacity."

Dillon on Mun. Corp., 5th Ed., Vol. 4—Pars. 1631 and 1667.

19 Ruling Case Law, 1130 n

Wagner v. City of Rock Island, 146 Ill. 154.

Chicago v. Selz, Schwab & Co., 202 Ill. 545.

Palestine v. Siler, 225 Ill. 630.

Springfield Gas Co. v. Springfield, 292 Ill. 255.

In view, therefore, of the law and the facts governing this claim, in our opinion, the City of Chicago is liable for the damage. The Law Department, however, has not attempted to determine the actual extent of the loss sustained by the claimant.

For your information all files are returned herewith together with reports of the Water Pipe Extension Division and the Law Department's Investigator, which are self explanatory.

Respectfully submitted,

LAWRENCE J. FENLON,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Proposal to Furnish Free Cans to City in Return for Advertising Privilege.

June 13, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

I beg to acknowledge receipt of your letter of the 11th instant, enclosing copy of a proposal submitted by the Empire Steel Products Company offering to furnish cans to the City free of charge for the privilege of maintaining advertising thereon.

This is a matter that has been brought to the attention of the Law Department heretofore, there having been a number of similar proposals made. It has been held, however, in the case of *People v. Clean Street Company*, 225 Ill. 470, that the City is without legal power to enter into a contract of this kind and for that reason we are compelled to advise that the offer in question can not be availed of by the City.

Very truly yours,

FRANCIS X. BUSCH,
Corporation Counsel.

Broadway System of Sewers—Status of Contract as Affected by Remonstrance Petition.

June 19, 1924.

HON. JOHN J. SLOAN, President, Board of Local Improvements, City of Chicago.

Dear Sir:

The following letter written by you and addressed to this department under date of the 16th instant, has been received:

I am in receipt of a copy of a 10-page letter addressed to the Corporation Counsel, from Attorney George Miller, representing the White Construction Company in the Broadway sewer matter. His contention is that our cancellation of that contract was without legal warrant, and if that is so, the sooner we know it the better, so that proper action can be taken here.

Delegations are insistent that that sewer, or something similar be built to afford relief on the North Shore, and our investigations bear out that fact. If a legal contract exists, we should go through with it. If not, then the necessary steps to void all legal proceedings that will not enable us to bring new proceedings and award a new contract should be promptly taken.

I would be obliged for your early advices so that the board may be advised how best to proceed.

On August 23, 1923, in compliance with your request, this department handed you an opinion as to the validity of a certain contract made and entered into on October 28, 1922, between the Board of Local Improvements of the City of Chicago and the White Construction Company. The text of the original contract was placed at our disposal, and the contents of that instrument were the only facts we had upon which to base our opinion. So that you may have the entire subject matter before you, I submit for your information a brief chronological history of the proceeding:

The original ordinance upon which this improvement was based was published on June 29, 1920, and passed by the City Council on November 24th of the same year. The petition for the improvement was filed in the County Court as Docket No. 45104, on December 22, 1920, and judgment of confirmation was entered April 29, 1922. The engineer's estimate of cost, filed in court with the assesment roll, amounted to the sum of \$2,000,000.00, including the lawful expenses provided for by statute. The assessment roll was modified, or reduced by the judgment of confirmation to the sum of \$1,801,693.98, being a reduction of \$198,306.98 from the estimated cost.

The board advertised for bids, and the White Construction Co. being the lowest bidder, the contract was awarded to that company on October 14, 1922, and executed October 28, 1922, for the sum of \$2,386,560.00, the exact amount of the cost of the improvement. Your attention is directed to the fact that the difference between the contract price and the sum confirmed in court amounts to seven hundred and four thousand, one hundred ninety-four dollars and two cents (\$704,194.02).

A supplemental assessment was ordered by the board, and a public hearing for the consideration of same was held on October 13, 1922, when the board decided to proceed with the work. The board, on November 22, 1922, submitted to the City Council an ordinance for a supplemental assessment. This ordinance was referred to the proper committee, which reported it to the City Council with the recommendation that it be placed on file, and the recommendation was adopted. Up to this date the Council has not passed the ordinance for the supplemental assessment, and the Broadway sewer, so called, has never been constructed.

I now refer you to a careful perusal of our opinion dated August 23, 1923. In the light of the information placed before us at that time, we would not, even now, alter or modify that opinion.

However, a matter of very great importance and of serious concern, bearing upon this contract, was not disclosed to us at the time you asked for our opinion. That was the important fact that on November 13, 1922, just exactly sixteen days after the execution of the contract in question, a remonstrance petition was filed with the Board of Local Improvements under the authority of Paragraph 3, Section 8, of the Local Improvement Act. This petition purports to have been signed by the owners of a majority of the frontage of property along the line of the proposed improvement, within thirty days after the date of the public hearing on the supplemental proceeding. A remonstrance petition automatically stays all proceedings therein for a period of one year. (Sec. 8, Local Improvement Act.)

It may be contended that a remonstrance petition does not lie in the matter of a supplemental assessment. Where a public hearing is necessary, whether in an original or *supplemental* proceeding, it is my opinion that property owners have the right and the privilege, if they so desire, to file a remonstrance petition. The Supreme Court of this state has never directly passed upon this point, but the statute provides (Sec. 59, Local Improvement Act) that at any time after bids have been received, if it shall appear to the satisfaction of the board that the original assessment is not sufficient to pay the contract price, or the bonds or vouchers issued, or to be issued, in payment of such contract price and accrued interest thereon, the board shall order an estimate of the amount of such deficiency, and thereupon a supplemental assessment, to cover such estimated deficiency of the cost of the work and interest thereon, may be made in the same manner, or as nearly as may be, as in the original proceeding, "and so on until sufficient money shall have been realized to pay the cost of such improvement and such interest." It seems to me, therefore, that in levying a supplemental assessment to meet a specified deficiency, where a public hearing is necessary under the law, and where every step in a supplemental proceeding shall be had or taken in like manner as in an original proceeding, it is my opinion

that a proper and correct interpretation of the statute would recognize a remonstrance petition precisely the same as in an original proceeding.

Has the White Construction Company breached its contract? I have made a careful examination of this contract, and now that my attention has been called to the filing of the remonstrance petition as aforesaid, I am satisfied, based upon all the information before me, that this contract is a valid instrument; that the filing of the remonstrance petition, and the failure of the City Council to pass the ordinance for the supplemental assessment, was sufficient cause to justify the contractor for the apparent delay on its part in entering upon the performance of its contract.

Mr. George W. Miller, representing the White Construction Co., in his letter addressed to Hon. Francis X. Busch, Corporation Counsel, under date of June 5, 1924, asks that our opinion of August 23, 1923, be reconsidered in view of the statements contained in his said letter. This we cannot do. Our said opinion was based upon the facts disclosed to us at the time we submitted it, and we believe now as we did then that our opinion was sound and that our conclusions were properly arrived at. You will recall that we made the following reservation in our opinion of August 23, 1923, in paragraph 3, page 3, to which we respectfully direct your attention:

“The writer, of course, does not profess to be conversant with any facts that may have transpired subsequent to the letting of this contract and bearing upon or explaining the delay on the part of the contractor in commencing the work. As before stated, however, if such delay has not been assented to by the City or has not been occasioned by an act of omission or commission on the part of the City, then The White Construction Co. has defaulted in the performance of a material and essential element of its contract and you should revoke the permits, but written notice should be given the contractor of the election of the City of Chicago so to do.”

It is not a question of reconsidering our opinion as suggested by Mr. Miller, but of now giving one based upon facts which were not called to our attention in the first instance, and which we specifically stated we had no knowledge of.

Perhaps the White Construction Company has been negligent on account of its failure to commence operations in the construction of the sewer prior to November 7, 1923, but, if so, my attention has not been called to it, and I have no means of knowing whether or not the White Construction Company has been guilty of any specific acts of negligence in the premises.

The writer is not advised, and never has been advised, whether or not the cost price indicated on the face of the contract is fair and reasonable, and of course no opinion is given on that point.

Based upon the information now before me, I am of the opinion that it is extremely doubtful if the City could successfully maintain that there has been a breach of this contract by the White Construction Company. Inasmuch as it is your desire to proceed immediately with the construction of this sewer, I respectfully suggest that the Board of Local Improvements rescind its action of August 30, 1923, in cancelling said contract.

Respectfully submitted,

PHILIP J. McKENNA,
Attorney, Board of Local Improvements.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

(Note: See earlier communication on the same subject in the preceding volume of Opinions, under date of August 23, 1923, and the subsequent opinions thereon, *post*, under dates of December 4, 1924, and December 23, 1924.)

Requirement of Garage License for Maintenance of Open Parking Space.

June 20, 1924.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir :

We have your letter of June 17th concerning an outdoor parking space conducted by one David Klein in the vicinity of Galt, Sunnyside and Clarendon avenues.

Please be advised that the status of such a parking space is identical to that of any public garage and is consequently subject to all the limitations and impositions of the City ordinance concerning public garages. Art. 2, Ch. 11, of the 1922 Code (Sec. 242) defines a public garage as "any building, structure, *premises, enclosure or other place* (except a public thoroughfare) within the City, where two or more automobiles, autocars or any similar self-propelled vehicles are stored or parked in a condition ready for use, or are stored or parked for repairs or service"; etc. (Italics ours.)

It is perfectly clear, and we have heretofore so held, that an open parking space, such as the one you mention, is clearly within the designation of the ordinance, and you are, therefore, advised to proceed as in other cases of public garages.

Yours very truly,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Payment of Local Improvement Condemnation Judgments Out of Bond Funds.

June 20, 1924.

HON. ROSS A. WOODHULL, Chairman, Finance Committee.

Dear Sir:

We are in receipt of your letter with accompanying correspondence and data, concerning the necessity of obtaining money from certain bond funds in order to pay condemnation judgments awarded in the local improvement proceedings involving such bonds. We have a letter of inquiry from the President of the Board of Local Improvements relating to the same subject matter, and the writer has discussed the question with a representative from the City Treasurer's Office and members of your staff.

Your letter specifically asks for drafts of orders and ordinances covering the situation. We have drafted these and submit them herewith. We also outline our opinion as to the general policy to be pursued.

It seems that there are five separate local improvements under way on which money is immediately required to pay for property taken. In each case there is a bond issue available for the improvement, and the desire is to draw on the bond fund for the purpose of paying the condemnation awards. In two of the five cases there have been advancements made to the extent of 75 per cent of the special assessment that has been spread. In the other three cases the warrants for the special assessments have not yet been placed in collection.

The two warrants that are in collection are both on the Ashland avenue improvement. The question that arises as to this bond issue is whether the fund can be used to pay for the land, the city having elected to enter judgment for the property taken.

The ordinance providing for these bonds (Council Journal, July 21, 1919, pp. 1023-4) gives as the purpose for which they are issued, "paying that portion of the cost and expenses to be borne by the City of Chicago which has now accrued and may hereafter accrue in the matter of the widening and extension of North Ashland avenue and South Ashland avenue," etc. Under this provision it is lawful for the City to pay any expense or cost for which it is unconditionally liable.

When the City takes or damages land in a proceeding of this kind it becomes unconditionally liable to the owner for the amount of the judgment and even for any increased amount that may be awarded on appeal, if the City has exercised its election to proceed. Section 32 of the Local Improvement Act explicitly requires this, as will appear from the following language:

"Upon the return of a verdict in a proceeding to acquire property for a public improvement, if no motion for a new trial be made, or if made, then if overruled, the petitioner shall within ninety days after final judgment as to all defendants, both as to the amount of damages and compensation to be awarded and benefits to be assessed, elect whether it will dismiss said proceeding or enter judgment in (on) said verdict. If it shall elect to enter such judgment, it shall become thereby bound and liable to pay the amount thereof, whether such assessment be collected or not, and such judgment or condemnation shall not be conditional."

Since the City is liable and the liability has actually accrued, we see no reason why the money in the bond fund is not available. It is true there has been an assessment levied for the purpose of paying for the judgments, and the law permits additional assessments to meet any deficiency that may occur, such supplementary assessments being limited only to the amount that the private property is benefited. If it should happen, however, that the private property assessed is not benefited sufficiently to make payment of the awards in full, the City would be liable for the difference.

In addition to the fact that the City is liable, and the bond fund would have to be drawn on in case of a deficiency, it is quite plain from the fact that the law provides for going ahead with the improvement pending appeal, and from other things that could be pointed out, that it was not the intention of the Legislature to require such a segregation of funds (all designed for a single improvement) that it is necessary to avoid using money on hand that is available for the improvement merely because a special assessment has been spread designed to take care of that part of the expense. The common sense view to take of this is that the funds on hand may be used, and when the assessment is collected there may be a reimbursement for the money so withdrawn.

So far as the other three advancements that are requested are concerned, they stand on the same footing as the two which we have mentioned, except that they have not proceeded to the point where warrants for collection would be in the hands of the collector. This, of course, is likely to happen very shortly, but whether it does or not, it is quite clear that the bond funds can be drawn upon until such time as the money comes in from the special assessments.

All moneys received on special assessments are to be used for the improvement in each instance, and therefore the final accounting will adjust the excess or deficiency as the case may be. That is undoubtedly the intention of the law, as will be seen by referring to Section 42, which authorizes the use of money from any installment for payment of bonds for the improvement, and does not require that the installments shall be so segregated that each of them is accounted for as it is used.

The only thing that need be done in order to make it possible to use the fund derived from the bonds in each instance is to pass the necessary order directing that the money be used. In other words, the appropriation at the present time is in such form that there must be a release of the fund appropriated to the improvement. To accomplish this we have drafted five separate orders.

In the case of warrant No. 49196, such order calls for an advancement of \$68,835 to be placed to the credit of said warrant and to be used for the payment of condemnation awards but to be subsequently reimbursed from the assessments. The same form is used for the advancement of \$57,790 to the credit of warrant No. 49049. In the other three cases the order is necessarily more general in its language.

We forward the five tentative orders herewith. We will also forward a copy of this opinion to the Board of Local Improvements and another to the City Treasurer so that they may be fully advised concerning the matter.

We return herewith the papers and memoranda which you submitted to us.

Yours very truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Scope of Discretion of Department Head in Assigning or Changing Duties of Civil Service Employee.

June 23, 1924.

HON. HERMAN N. BUNDESEN, Commissioner of Health.

Dear Sir:

Your letter of the 2d instant requesting an opinion from this office as to whether you may legally assign inspectors to work other than that indicated by their Civil Service titles, is received. We submit the following:

The position or employment of inspector in your department is created by appropriation ordinance pursuant to the general provisions of the statute and ordinances creating the department. The duties of such inspectors are not spe-

cifically defined or restricted in any of those enactments, and we are of the opinion that the Civil Service title of a position or employment is not so restrictive as to prevent the assignment of employes to work reasonably consistent with the purpose for which they were employed. To hold otherwise would be, in effect, to hold that the systematic organization and functioning of a department would be subordinated to a literal compliance with whatever is strictly indicated by the Civil Service designations. We are not aware of any rule of law that compels such a result. The statutes and ordinances creating the different departments of the city government provide in general terms for the employment of such help as is necessary to permit and insure a proper functioning, and specific limitations were doubtless avoided and omitted in order to permit some flexibility in the matter of operation. Where a position or an office is created by statute or ordinance, and the duties pertaining to it are specifically or by necessary implication indicated, a different situation is presented that need not be considered here. We see no legal objection to the assignment of inspectors in accordance with the plan suggested in your letter. It seems to us that such an assignment reasonably appertains to and is consistent with the general purpose for which the inspectors are employed. Departmental work should be assigned as nearly as may be in accordance with the spirit and purpose of the Civil Service Commission's classification, and the work properly assignable to a particular class of employes should not arbitrarily or except in case of emergency be otherwise assigned, but we assume there is no particular class specifically designated in the Commission's classification to perform the duties mentioned.

Accordingly it is our opinion that inspectors may be assigned not inconsistently with what is herein suggested.

Yours very truly,

JAMES J. COUGHLIN,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

Representative of Fire Department on Board of Trustees of Firemen's Pension Fund Under New Ordinance.

June 23, 1924.

HON. AL. F. GORMAN, Secretary, Fire Pension Fund.

Dear Sir:

We have your communication of the 20th inst., inquiring of this department, who, under the reorganization ordinance of the fire department, is the representative of that department on the Board of Trustees of the Firemen's Pension Fund.

The ordinance in question establishes the fire commissioner as the sole head of the department. Section 3 of an act to provide for a firemen's pension fund (cities over 200,000) states that the "marshal or chief officer of the fire department" shall be included in the Board's membership.

The City Council has ordained that the Fire Commissioner shall be the head of the department and have charge of "all matters and things pertaining to the fire department and *all* officers and employes therein engaged." The marshal, therefore, becomes a subordinate bureau head to the Commissioner and loses his rank as chief officer of the fire department.

There is then but one conclusion we can reach, and that is that the Fire Commissioner should henceforth take the position on the Board of Trustees heretofore assumed by the Fire Marshal.

Very truly yours,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Custom of Laundries Compelling Payment of Insurance by Customers.

June 25, 1924.

MR. JOSEPH RUSHKEWICZ, Secretary, Committee on High Costs and High Rents.

Dear Sir :

You have requested the Corporation Counsel for an opinion as to whether the public of Chicago are compelled to pay insurance on laundry, and whether there is any law to this effect.

Replying, we beg to advise, that there is no statute or ordinance compelling anyone to pay such insurance. The paying of insurance by a customer is purely a contractual arrangement between him and the laundry. If he agrees to pay such insurance, of course he is bound by his agreement. However, in the absence of such an agreement, and if there has been no prior dealings between the laundry and the customer in which the customer has recognized the contract with the laundry to charge him for insurance, no agreement can be implied in law to the effect that the customer will pay insurance, and the customer would be justified in refusing to pay it. The customer can always refuse in advance to pay for insurance and if the laundry takes his goods under such an understanding, the laundry has no right to charge insurance.

Very truly yours,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

**Status of Ten Foot Alley Running South 80 Feet from
East Jackson Boulevard at a Point 111 Feet West
of Michigan Avenue.**

June 27, 1924.

HON. JOHN D. RILEY, Superintendent of Maps.

Dear Sir:

Your letter of April 10th last concerning a ten foot alley running south a distance of eighty feet from East Jackson boulevard at a point one hundred and eleven feet west of Michigan avenue, as shown in Exhibit "A" attached to the decree entered in the Superior Court of Cook County in the case of *Ann Mannierre v. Edward Manierre, Trustee, et al.*, entered January 7, 1871, and requesting this office for an opinion as to whether the alley in question is a public alley, as indicated on your records, is received.

It is our opinion that the alley is not a public alley, and further, that the fee to this ten foot strip has long since merged with the fee to the lots adjoining on the east and west sides thereof.

The lot or parcel from which this alley was set out fronted eighty feet on Michigan avenue and about one hundred and sixty-five feet on Jackson boulevard. It was legally described as Lot One (1) in Block Eight (8) in Fractional Section Fifteen (15) Addition to the City of Chicago. This lot was acquired prior to the Civil War by George Mannierre, who died intestate in 1863.

Mannierre, by his will, created a trust devising the lot in question, among others, to three trustees to be held for the use of certain named beneficiaries for a period of seven years. At the expiration of the trust, in 1870, his widow filed a bill in the Superior Court, naming as defendants numerous other beneficiaries and interested parties, praying the court to decree a partition of the lands described in the

bill. Reference was had to a master and on January 7, 1871, a decree was entered confirming the master's report and ordering that the lands be partitioned, and appointing Commissioners to make the partition in accordance with the court's finding as to the interests and rights of the respective parties. The Commissioners accordingly partitioned the lot in question by subdividing it into five lots and the alley in question—three of the lots fronting on Michigan avenue and extending west one hundred and eleven feet, and the other two lots fronting on Jackson boulevard. The alley was platted and set out, presumably for the purpose of making the various lots accessible from the rear.

The Commissioners' partition or plat was approved by the court April 8, 1871, and thus became part of the decree. So far as we are able to learn, this is the only subdivision or plat of this lot that has ever been made. And while this subdivision or partition creating the alley may have been made agreeably to all parties concerned, although it should be noted in passing that some of them were minors, the partition and setting out of the alley must nevertheless be regarded as the act of the court, and it is fundamental that a partition decree cannot dedicate any portion of the partitioned lands to the public use. To hold otherwise would be in effect to legalize the taking of property without due process of law.

When the partition was made final and conclusive by the confirmation and approval of the Commissioners' report, the fee to the alley strip was held in tenancy in common by the devisees who took the partitioned parcels in the original parcel and the rights therein of each of the feeholders became and was subject to the rights and the easement of each of the other tenants so long as the fee to the different lots was vested in more than one person. But when subsequently, as was the case, the fee to each of the five lots set out by the partition became consolidated into a single tenancy, the alley easement theretofore existing in the different owners was extinguished by merger and the fee to the alley strip merged

into the single tenancy of the owner of the lots. This automatically eliminated the alley.

There was nothing about this proceeding in the Superior Court that could in any way be construed as either a common law or statutory dedication of the strip in question to the public use. And it does not appear from the tract book that any plat has ever been made and recorded in accordance with the terms and provisions of the Plat Act, so that it is clear that no statutory dedication has ever been made. And from our own knowledge and observation of the lots in question we do not think that a common law dedication or a public easement by prescription has ever been impressed on this land.

You are, therefore, advised that it is our opinion that the phrase "public alley" appearing on your records is a mistaken designation and that the alley is not and never was a public alley in the sense that it was ever dedicated to the public use.

Yours very truly,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

**Power of City To Require Compensation for Landing
of Passenger Boats at Bulkheads, Jetties and
Streets Ends.**

July 2, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

You have requested this department for an opinion as to whether the Commissioner of Public Works has the power

and authority to permit the landing of passenger boats at bulkheads, jetties and street ends, and whether the Commissioner may fix rates for the same.

Section 3 of "An Act to enlarge the power of cities and villages in relation to harbors, canals, slips, wharves, docks, levees, piers, quay-walls, breakwaters and all harbor structures, etc.," approved June 23, 1913, in force July 1, 1913, provides in part as follows:

"Section 3. Every such city and village shall have the power to lease portions of any of the utilities mentioned in Section 1 of this act, for a period not longer than twenty (20) years on such terms and conditions as shall be prescribed by ordinance, *and fix and regulate the rates and charges for the use of such utilities*, whether owned and operated by such city or village, or are operated by persons or corporations who are tenants of such city or village or are constructed, owned and operated by any public or municipal corporation as hereinafter provided. * * *"

By virtue of the powers granted by the above-quoted section of the Harbor Act, we are of the opinion that the City of Chicago has the power to fix rates and charges for the use of any harbor utility. However, such rates must be fixed by the City Council. The Chicago Municipal Code of 1922 does not delegate to the Commissioner of Public Works the power to fix rates for the use of harbor utilities, and we are of the opinion that such a delegation of power, if it existed, would be unconstitutional as a delegation of legislative power to an executive officer. Furthermore, we are of the opinion that the Harbor Act contemplates that the fixing of all rates for the use of such utilities shall be done by the City Council.

We are of the opinion that a harbor structure which has been constructed by the City of Chicago upon land abutting on the harbor, and purchased or condemned by the city, clearly comes within the purview of the Harbor Act, and can be used or leased by the City for the purpose of docking boats. In the case of bulkheads and jetties which are con-

structed at street ends, we are of the opinion that the City has the right to charge compensation for the use of said structures by steamships. When a structure is located at the butt end of a street in which the City owns the fee, as contra-distinguished from a mere easement, there can be no question but that the City has the riparian right of access to the water from the end of said street. Therefore, in such a case, it clearly has the right to require compensation for the use of such structure by steamships for docking purposes.

If, on the other hand, the City only has an easement in the street, and the fee in the street is owned by the abutting landowner, we are still of the opinion that the City has the right to charge for the use of the bulkhead or other structure placed at the water's edge. It has frequently been held that when the City has an easement in a public street which abuts upon navigable waters, that there is coupled with that easement the common law right of access to the water.

1 Dillon, *Municipal Corporations* (5th Ed.), Sec. 271.

Godfrey v. The City of Alton, 12 Ill. 29.

Holmes v. Cleveland, C. & C. R. Co., 93 Fed. 100.

M'Closkey v. Pacific Coast Co., 160 Fed. 794.

We desire to call attention, however, to the fact that the Lincoln Park Board is contemplating action under a statute which gives it the power to construct a boulevard in the waters of Lake Michigan from Lincoln Park north, said boulevard to parallel the shore line. It is provided in the above mentioned statute, that as soon as a plan for said boulevard is adopted by the Lincoln Park Commissioners, the fee in the land underlying the waters of Lake Michigan between the shore line and the proposed boulevard shall thereupon vest in the said Commissioners. The adoption of such a plan and the construction of such a boulevard would, necessarily, alter the situation as heretofore outlined with regard to the butt ends of public streets. In this opinion, we do not consider the effect of such a situation.

In conclusion, therefore, we are of the opinion that the City has the right, power and authority to require compensation and fix rates for the use of any harbor structure of any kind or nature whatsoever, provided it be located upon land owned or leased by the City of Chicago or upon the butt end of public streets. The fixing of the rates must, however, be done by the City Council.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Cost of Removing Hydrant in Connection with Track Elevation.

July 2, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have your letter of the 26th ult., relative to the cost of the removal of a fire hydrant located in Crossing street about two hundred feet west of Elston avenue. Your letter states that "The hydrant will have to be removed on account of the track elevation work of the railroad company" (Chicago and North Western Railway Company) "made necessary by the opening and extension of North Ashland avenue." Whether the cost of removing said hydrant should be borne by the Chicago and North Western Railway Company or by the City will depend, therefore, upon proper interpretation of the terms and provisions of an ordinance passed by the City Council on July 2, 1923, and accepted by said Chicago and North Western Railway Company on Au-

gust 2, 1923, entitled, "An Ordinance requiring the Chicago and North Western Railway Company to carry the tracks on its right of way at North Ashland avenue and Cortland street over North Ashland avenue as and when widened and extended."

The ordinance of July 2, 1923, contains no specific terms or provisions relative to any changes and relocations of the water mains, sewer pipes or other conduits of the City of Chicago that may be made necessary on account of the reconstruction work required by said ordinance. Whether the cost of such changes and relocations shall be borne by the Railroad Company or by the City must therefore be determined by reference to the purpose and intention manifested by the ordinance as a whole.

The terms and provisions contained in said ordinance of July 2, 1923, differ in many respects from the terms and provisions ordinarily found in track elevation ordinances that have been passed heretofore by the City Council. Such track elevation ordinances heretofore passed have usually required railway tracks which theretofore were at grade to be elevated in order to eliminate dangerous grade crossings and provide for the safety of the public passing to and from along the streets of the City and the cost of such work has been borne entirely by the company or companies whose tracks were elevated.

In the present instance, however, the Chicago and North Western Railway Company had already elevated its tracks and eliminated grade crossings along the line of its railway in accordance with an ordinance passed December 29, 1897. The reconstruction work provided for in the ordinance of July 2, 1923, is made necessary on account of the opening and widening of North Ashland avenue in accordance with an ordinance recommended by the Board of Local Improvements and passed by the City Council on January 9, 1921. It is therefore provided in said ordinance of July 2, 1923, that the cost of the work shall be divided between the Company and the City and the intention is clear that the City

shall assume responsibility for contingent damages to the tracks, wires, pipes, conduits or other properties not belonging to the Railroad Company which it may be necessary to alter or relocate on account of the work done under said ordinance. Section 14 contains the following language in which the City assumes such responsibility:

“If, in connection with the work provided for in this ordinance, it is found necessary that the grade or alignment of the tracks of the Street Railway Company, in Cortland street either in the subway or on the approaches, be changed or if further it be found necessary that any change in the location of any other public utility be made in Cortland street, then said Chicago and North Western Railway Company shall not interfere with the tracks, wires, poles, conduits, etc., of said Public Utility Companies, but shall give notice in writing to the City of Chicago that such change or changes are necessary, giving a detailed statement of the change required, and if upon the receipt of such notice the Commissioner of Public Works of said City is of the opinion that such change or changes are necessary then the said City of Chicago shall take such action as may be necessary to compel said Street Railway, or other Public Utility Company, at its, or their own expense to make such change or changes; and the City of Chicago, provided said Chicago and North Western Railway Company complies with the conditions in this paragraph specified, shall save the Chicago and North Western Railway Company harmless from all damages, or proceedings in equity that might be recoverable, or brought by any of the Public Utility Companies at interest for changes required in their property. * * *”

It is true that this section deals with the properties of other public utility companies rather than with the water mains, sewer pipes and hydrants of the City but we think it is significant as showing that the City assumed responsibility for such alterations and relocations as were made necessary by the work while the Railroad Company assumed only the costs specified in the ordinance. However, the following language, found in Section 9 of the ordinance, seems to us to furnish a conclusive answer to your question:

“The Chicago and North Western Railway Company shall, in connection with the reconstruction of the Cortland street bridge, bear the entire cost of the adjustment necessary to the existing structure under its easterly three tracks, which tracks serve the Milwaukee Division of said railway company, and shall also bear the entire cost of the additional span necessary to support the industry track easterly of and adjoining the Milwaukee Division tracks; and the City of Chicago shall not recompense or reimburse said railway company for the cost and expense of said work or any part thereof but the City of Chicago *shall recompense and reimburse said Chicago and North Western Railway Company for the actual cost and expense of all other work required by this ordinance.*”

We are therefore of the opinion that the cost of removing said fire hydrant should be borne by the City and not billed to the Railroad Company.

Very truly yours,

C. M. DOTY,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

Power of Surface Lines Under Present Charter to Operate Motor Buses.

July 2, 1924.

HON. U. S. SCHWARTZ, Chairman, Local Transportation Committee.

Dear Sir:

We beg leave herein to reply to your letter, transmitting a copy of an order introduced by Alderman Thomas J. Bowler,

relative to the operation of motor buses by the Chicago Railways Company as part of the system of local transportation operated by that company. The order contemplates the use of such buses on streets where street railways are not being operated in lieu of extensions of the street railway lines themselves; in other words, said company upon the installation and operation of such bus lines would be operating a combined system of street railways and motor buses, charging a single fare and transferring passengers from motor buses to street railway cars and *vice versa*, in like manner, as passengers are at the present time transferred from one street railway line to another. In your letter you ask us "to give the Committee an opinion as to what would be the best procedure to accomplish the purpose of the Bowler order."

The Chicago Railways Company was incorporated in 1903 under and in accordance with the provisions of "An Act concerning Corporations," approved April 18, 1872, and in force July 1, 1872, and all acts amendatory thereof; in other words, under the general incorporation laws of the State of Illinois as then or thereafter existing. The charter of the company declares the purpose of its organization as follows:

"The object for which it" (the company) "is formed is to construct, own, purchase, lease or otherwise acquire street railroads in the City of Chicago and in the Counties of Cook, Lake, McHenry, DuPage and Will in the State of Illinois and to operate the said railroads owned, leased or otherwise acquired by it with animal, cable, electric or other power authorized by law and to own and enjoy all real and personal property necessary or proper for the prosecution of the business aforesaid."

In view of the above described objects for which said company was incorporated, and the settled rule of this state that the charter of a corporation is the full measure of its powers, and if any doubt arises out of the language employed in such charter, such doubt must be resolved in favor of the State and against the corporation (*Illinois Health University v. People*, 166 Ill. 171; *People v. Pullman's Palace Car Com-*

pany, 175 Ill. 125; *Fritze v. Equitable Building and Loan Society*, 186 Ill. 183), we are of the opinion that the operation of motor buses by said company in the manner contemplated by the Bowler order would be *ultra vires* of the corporate powers of the company and therefore illegal.

In *People v. Illinois Central Railroad Company*, 233 Ill. 378, the Supreme Court of Illinois held the operations of public warehouses by a railroad company to be *ultra vires* although it was contended that the business of operating such warehouses was so necessary to the railroad business that the power to operate them should be implied.

The court said (p. 385):

"It is not contended that the power to own and operate public warehouses, as a business, is expressly conferred by the special charter of the Illinois Central Railroad Company or by any general law relating to railroads in this state. Appellants' contention is that the power contended for is implied, because its exercise is necessary in order to enable the railroad company to accomplish its duties as a common carrier of grain. *A power which the law will regard as existing by implication must be one in a sense necessary,—that is, needful, suitable and proper to accomplish the object of the grant; one that is directly and immediately appropriate to the execution of the specific powers, and not one that has but a slight, indirect or remote relation to the specific purposes of the corporation.*" (Italics ours.)

In *People v. Chicago Gas Trust Company*, 130 Ill. 268, the same court held a corporation organized to manufacture and sell gas had no implied power to own stocks in other gas companies. The court discussing the express and implied powers of corporate bodies said (p. 283):

"Corporations can only exercise such powers as may be conferred by the legislative body creating them, either in express terms, or by necessary implication; and the implied powers are presumed to exist to enable such bodies to carry out the express powers granted, and to accomplish the purposes of their creation. An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and

not one that has a slight or remote relation to it."
(Italics ours.)

In *Chicago and Southern Traction Company v. Flaherty*, 222 Ill. 67; *Bradley Manufacturing Company v. Southern Traction Company*, 229 Ill. 170, and *Gillette v. Aurora Railways Company*, 228 Ill. 261, it was held that companies incorporated under the General Railroad Act to establish and maintain commercial railroads, could not operate in connection therewith street railway systems and street railway service in towns through which such railroads passed.

While the Bowler order refers specifically to the Chicago Railways Company, it may be said in passing that the corporate powers of the other companies constituting the Chicago Surface Lines, viz.: the Chicago City Railway Company, the Calumet and South Chicago Railway Company and The Southern Street Railway Company, are in like manner restricted to the operation of street railroads, and the operation of motor bus lines by said companies would likewise be *ultra vires* of their corporate powers. The Calumet and South Chicago Railway Company and The Southern Street Railway Company are incorporated under the general incorporation laws of the State of Illinois with charter objects specifically restricted to the operation of street railroads, while the Chicago City Railway Company was incorporated by a special act of the General Assembly approved and in force February 14, 1859, entitled "An Act for the promotion of Horse Railways in the City of Chicago."

Should the companies desire to operate such motor bus lines, they must first cause their charter powers to be amended in such manner as to supply the corporate authority now lacking. Thereafter, before installing and operating such motor bus lines or any of them, it would be necessary for the companies to apply for and receive a certificate of convenience and necessity from the Illinois Commerce Commission for each such motor bus line, and also permission and authority by general or special ordinance from the City Coun-

cil for the use of all or any streets over which such motor bus lines were to be operated.

Respectfully submitted,

C. M. DOTY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Issuance of Duplicate Bonds Where Original Bonds Were Registered.

July 3, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We are in receipt of your letter of recent date in which you state that a request has been made by Miss Edna B. Parker for duplicate water certificates to replace those stolen from her by burglars on the night of May 28, 1924. The certificates were duly registered in your office.

When bonds or other written obligations of the City of Chicago which are not registered are lost or stolen we always consider it necessary, in order that the City's officers may be fully protected, to require a claimant to proceed under Section 14 of the Negotiable Instrument Act of 1874. (See Cahill, 1923, p. 2355.) This requires a judgment of a court and the filing of an indemnity bond for double the amount due. We see no reason, however, for insisting on this rigid requirement in a case where the bonds or certificates are registered, as in the present instance.

If the stolen bonds were to fall into the hands of an innocent purchaser for value he could not claim the money

due on them when they show that they are registered in another person's name.

Benwell v. City of Newark, 55 N. J. Eq. 260.

Scollans v. Rollins, 173 Mass. 275.

Such instruments are negotiable in the sense that they can be transferred by the owner, if the name of the payee is changed by a re-registration. (*D'Esterre v. City of Brooklyn*, 90 Fed. 586.) But there is no liability on the part of the City to anyone who is not registered.

We therefore advise you that if you have the necessary blank forms for duplicate certificates they can be made and turned over, and the former ones cancelled. We recommend that such distinguishing marks or numbers be put on the certificates and coupons and on the book of registry that there will be no danger of paying the originals in case they appear.

Yours truly,

LEON HORNSTEIN,

Acting Corporation Counsel.

Examination of Men Arrested in Raids on Disorderly Houses for Venereal Diseases.

July 7, 1924.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

We are in receipt of your letter of recent date, in which you urge us to reply to your former communication in which you asked certain questions on disorderly houses. We have held the matter in abeyance some time in order to get the best light on the subject that was available.

Attached to your letter is a communication sent to you by the Commissioner of Health and a copy of the Rules and

Regulations of the State Department of Health concerning the control of venereal diseases. The letter of the Commissioner of Health requests that men taken in such raids be held and turned over to the Department of Health for examination.

The precise question you ask is whether or not you can refuse bail when offered for persons so arrested. If this were to be regarded as a categorical question and answered that way we would fall far short of advising you fully. In other words, we could answer this question offhand with the reply that both the Constitution of the United States and the Constitution of this State provide that bail cannot be denied. But there is involved in this matter a much more important and complicated question which we deem it proper to discuss in detail. That is the question of the extent of the powers of the City's health officers in dealing with persons so arrested.

From an examination of the authorities and the cases recently decided, it would appear that our Supreme Court has gone nearly, if not quite, to as great an extreme as any of the courts of last resort in applying the police powers of the State in cases involving contagious or communicable diseases. Under these circumstances the inquiry resolves itself into the question whether it would sustain the procedure authorized by the rules of the State Department of Public Health. These rules seem to be based on the interpretation placed on certain of the language used in the case of *People ex rel. Barmore v. Robertson*, 302 Ill. 422, and it therefore becomes necessary to examine that case closely in order to determine just what the court has decided therein.

The *Barmore* case was one in which a woman who was not actually sick, but who was found to be a typhoid carrier, was quarantined. She had voluntarily submitted herself to a physical examination, and therefore the question you ask is not answered by anything in that case.

The court held that the State Board of Health was a ministerial body with power to determine certain facts in

regard to the existence of contagious and infectious diseases and the wisdom and propriety of the means to be adopted to suppress the spread of same, and that in the exercise of this power it had the right to establish a quarantine and to promulgate rules and regulations relating thereto which would have the force of law. Such power is not a delegation of legislative authority. The court said it will not pass upon the wisdom of the means adopted to restrict and suppress the spread of such diseases.

We have no doubt that the law permits the public authorities to go as far in the case of the venereal diseases which are known to be shockingly prevalent and which will require drastic measures to stamp out as in the case of the dread typhoid germ. That is not stated in the case we are considering, but the decision gives authority for such an assertion.

The court further held that, under the powers granted to cities and villages, a local board of health could be created which would have the same powers in regard to these matters within the municipality as the State board has, but that no authority had been delegated to the City Council to confer such powers on an individual in place of a board. Consequently the Commissioner of Health has no such power.

In passing on this point the court made use of the expression, "His authority is limited to carrying into execution proper orders of a legally constituted board of health" (p. 436). We are of the opinion that the interpretation placed on these words by many who have had to deal with these matters has been exceedingly strained.

We find nothing in the decision which holds that the City Council has not the right to pass ordinances relating to health and the measures to be taken to suppress disease. Nor do we understand the court to mean that the Commissioner of Health is incapable of determining whether a person has a disease or not. What the court did hold was that the determination of whether a disease is a contagious disease and whether it is necessary to adopt quarantine meas-

ures, and that the adoption of such measures either by directly taking charge of a case or through rules and regulations was within the control of the board and not of an individual officer. The ruling of the court, however, has had the effect of placing into the hands of the State Board of Health the direction of the activities of the local authorities in such matters and the rules and regulations mentioned above are directly due thereto.

The particular expression of the court which has been so frequently referred to must be read in the light of the context, and when this is done we believe our interpretation is correct, as will appear from the following excerpts: .

“Section 2 of the act creating the State Board of Health gives the department * * * supreme authority in matters of quarantine. It is also given authority to make such rules and regulations as it shall from time to time deem necessary for the preservation and improvement of the public health and makes it the duty of all local health and police officers to enforce these rules and regulations.

* * * * *

“In the case at bar the State Board of Health, or a board of health in the City of Chicago duly organized pursuant to the authority given to the City Council by the legislature, undoubtedly has the right to establish reasonable quarantine regulations with respect to relatrix so long as she is discharging the germs of a contagious or infectious disease.

* * * * *

The only question presented for determination is whether she is legally and properly detained under quarantine in her home. In order to determine this question we must determine whether an authority authorized by the legislature of this State to determine when a person is afflicted with a contagious or infectious disease and to quarantine against the spread of such disease has acted in establishing the quarantine over the home and person of relatrix. * * * The health commissioner of Chicago is purely a ministerial officer and has no legislative powers whatever. The statute gives to no such individual authority to make rules and regulations which shall have the effect of law. The city has no right to give him au-

thority to determine when a contagious and infectious disease exists and to establish a quarantine. His authority is limited to carrying into execution proper orders of a legally constituted board of health."

Thus, it will appear that the limitation of the authority of the Commissioner of Health has reference to his power of determining what diseases are contagious and infectious to an extent that they should be quarantined and to his power of establishing a quarantine. There is nothing in the decision, however, which says that the City Council may not legislate on the subject or which says that the Commissioner of Health may not enforce valid ordinances of the City Council relating to the subject-matter. But as to carrying out the orders, rules and regulations of the State Department of Health, there is no doubt of the authority of the local health authorities to work in that way if it should be deemed safer or more desirable to do so than through the slow process of waiting for council action.

It is well also in this connection to analyze the *Barmore* decision with reference to the powers which the court ascribes to the State Board of Health. It says that this board has power to adopt reasonable regulations, but that the court will interfere if the regulations are arbitrary and unreasonable (p. 432). The court further says that a quarantine cannot be established until an emergency actually exists and the regulation becomes necessary (p. 433), that a person cannot be quarantined on mere suspicion but the health authorities must have reliable information on which they have reasonable ground to believe that the public health is in danger (p. 432), that otherwise the health authorities cannot interfere with the liberties of a citizen, and that "health regulations are all sustained on the law of necessity and when the necessity ceases the right to enforce the regulations ceases" (p. 433). The question of whether or not any authority exists to compel a person apparently well to submit to an examination is expressly avoided (p. 434).

When we come to apply these rulings to the handling of the problem confronting the Department in Health in the

stamping out of venereal diseases we encounter great difficulties. In fact, no one can say at this time how far the courts will go in support of such efforts. The Supreme Court has gone far enough, however, to indicate that it will not undertake to supplant the views of the State Board of Health with its own so far as the wisdom of the measures adopted are concerned, and it has further indicated that its interference will come only when the regulations are arbitrary or unreasonable. It will probably be harder to determine when an emergency exists and whether such emergency is great enough to warrant the enforcement of the rules.

The courts generally recognized the fact that stringent laws were necessary in order to prevent the spread of venereal diseases during the period while training camps were established in different parts of the country. (See *Rock v. Carney*, 185 N. W. 798.) Under those conditions there were laws passed authorizing the quarantining of persons afflicted with venereal diseases. Whether the courts will permit it without such express statute is a question. But in place of the statute we have the rules and regulations of which we speak which under the conditions named have the effect of law. There is ground for assuming that unless they are shown to be unnecessary they will be given binding force.

In some jurisdictions forcible examination of suspects has been permitted.

State ex rel. McBride v. Superior Court, 103 Wash. 409.

See also case note 2 A. L. R. 1332.

In other jurisdictions there can be no such examination against the will of the suspect.

Wragg v. Griffin, 185 Iowa, 243.

State v. Horton, 247 Mo. 663.

The Supreme Court of this State may hold that such forcible examination is an invasion of constitutional rights. But it would seem that the Department of Health will have means of approaching the subject in such a way that most

suspects would be willing to submit voluntarily to an examination.

We apprehend that in the long run the proper enforcement of the rules and regulations of the State Department of Health with respect to these diseases will depend in each case on the information obtainable before action is taken. If there is reasonable ground for believing that a person, whether male or female, is afflicted with a venereal disease, such person can be held for examination and quarantine. In case there is objection to an examination there may even be ground for placarding the room where such person sleeps as a place of suspected infection.

There does not appear to be any ground for discriminating between men and women in the treatment accorded. Experience has undoubtedly shown that the proportion of prostitutes thus afflicted is greater than among the male habitues, and that the likelihood of the spread of the disease from the prostitute is greater. But aside from that, the suspicion which attaches to an inmate cannot have greater weight in the one case than in the other.

Under Rule 7 as shown by the pamphlet submitted to us, any person who is an inmate of a house of ill fame and any man consorting with, caught in bed with, or in the bedroom of, a common prostitute is to be regarded as a suspect.

When such persons are taken in raids the proper course to pursue is to turn them over for examination in all cases where the parties will voluntarily submit to it. When they refuse, notice should be given to the Department of Health, so that if it can secure reasonable grounds for assuming that such disease exists it will have an opportunity of doing so.

If the Department of Health sees fit to placard in cases of suspicion where the suspect refuses to be examined, it will be following out the orders of the State Department of Health, and it may be that the responsibility for the enforcement of this provision will be placed on the State Department.

Therefore, while bail cannot be refused if it is tendered, the persons seized in raids of this kind should not be turned loose without notice to the Department of Health, so that if it has facilities for immediate examination and the means of either producing evidence or inducing such persons to submit voluntarily to examination, it may be given the chance to enforce the orders of the State Department of Health.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Validity and Constitutionality of Ordinance Prohibiting Sale of Meats on Sunday.

July 7, 1924.

HON. FRANK J. LINK, Chairman, Committee on Public Health.

Dear Sir:

We have your letter of the 3d instant transmitting a copy of the proposed amendment to Section 2017 of The Chicago Municipal Code of 1922, and requesting our opinion whether the said amendment would be valid and enforceable, if passed. The proposed amendment reads as follows:

“Section 2017. Sanitary methods required. Sales on Sunday prohibited.) It shall be unlawful for any person, firm or corporation to keep open or conduct any meat market or to expose or offer for sale therein, any fresh meats on the first day of the week, commonly called ‘Sunday’ provided that this section shall not be applicable to persons who conscientiously observe some other day of the week as the Sabbath, but that in such cases,

such persons shall make suitable arrangements with the Department of Health as to inspections."

From the expression first used in the amendment, viz.: "*sanitary methods required*" and the clause with which the final proviso concludes, viz.: "*in such cases, such persons shall make suitable arrangements with the Department of Health as to inspections*"; and also from the fact that the whole is offered as an amendment to Section 2017 of the Code, which section is part of the chapter relating to public health and deals with sanitary methods required in retail food shops, we understand the amendment is intended as an ordinance promoting public health. Except for such provisions the general text of the amendment might cause it to be regarded as a police regulation relative to the prohibition of secular business activities on Sunday. If the amendment when viewed from either of these standpoints would be a valid exercise of the City's legislative power, the enactment or rejection of the amendment would be a matter within the discretion of the City Council, but if said amendment cannot be sustained either as a health ordinance or as an ordinance relative to Sunday business activities, then it should not be recommended by your Committee nor passed by the Council.

That the City Council has been delegated the power and authority to enact legislation relative to the general subject-matter of the amendment cannot be questioned. The following clauses contained in Section 1, Article V of the Cities and Villages Act constitute an express delegation of power in the widest terms, to pass regulations promoting the public health, especially in respect to the sale of provisions for the food of man:

* * * * *

"Fiftieth. To regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, and to provide for place and manner of selling the same and to control the location thereof.

* * * * *

Fifty-third. To provide for and regulate the inspection of meats, poultry, fish, butter, cheese, lard, vege-

tables, cotton, tobacco, flour, meal and other provisions.

* * * * *

Sixty-sixth. To regulate the police of the city or village and pass and enforce all necessary police ordinances.

* * * * *

Seventy-eighth. To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease."

The powers so conferred have been construed by the courts with great liberality. In *Gundling v. The City of Chicago*, 176 Ill. 340, the court said (pp. 348-49):

"Paragraph 66 before quoted expressly authorizes the adoption of ordinances necessary to police power, and Paragraph 78 is an express authorization of the city council to make all regulations necessary or expedient for the promotion of health or the suppression of disease. Under these two provisions express authority is granted the municipality to pass all ordinances or requirements tending to promote the public health, morals, security, comfort and welfare of the community. Such legislation is included within the provision authorizing the enactment of police regulations. The most important of police powers is that of caring for the health of the community, and that is inherent in a municipality, and may be exercised whether expressly granted or not, because the preservation of the health of the public is indispensable to the existence of the municipal corporations.

* * * * *

Municipalities are allowed a greater degree of liberty of legislation in this direction than any other. The necessity for action is often more urgent and the consequences of neglect are more detrimental to the public good in this than in any other form of local evil. It being clear that the public health and welfare of a large class in the community would be subserved and protected by ordinances regulating the sale of tobacco in one of its manufactured forms, an ordinance directed to the protection of the health or welfare of that particular class of the community would be a police regulation within the power of a city to enact under the power expressly granted by Paragraphs 66 and 78."

While the power to pass ordinances respecting Sunday observance is not specifically granted to the City Council by the Cities and Villages Act, the courts have many times held that such ordinances come within the general police powers of the City as conferred by Clause 66, *supra*. *McPherson v. Village of Chebanse*, 114 Ill. 46; *City of Springfield v. Richter*, 257 Ill. 578; *City of Clinton v. Wilson*, 257 Ill. 580. The exercise of the aforesaid powers is, however, subject to constitutional limitations imposed upon the police powers of the State whether exercised directly by the State legislature or indirectly through municipal authorities by the Fourteenth Amendment of the Constitution of the United States and by the Bill of Rights of the Constitution of Illinois, i. e.: *that no person shall be deprived of life, liberty or property without due process of law nor shall any person be denied the equal protection of the law*.

The police power of the State whether exercised by the State itself or through local subdivision thereof extends to all great public needs, and the boundaries of its jurisdiction cannot be accurately defined, yet certain principles may be regarded as settled. All exercise of such power is subject to constitutional limitations and the validity of police regulations, whether designed to promote public health, public morals or public safety, must depend upon the circumstances of each case, and the character of the regulation, whether arbitrary or reasonable, or whether really designed to accomplish a legitimate public purpose.

Chicago, Burlington & Quincy Railroad Company v. Illinois, 200 U. S. 561.

And while it cannot be questioned that legislative bodies may classify the subjects of legislation within their respective jurisdictions and apply different regulations to persons and property in different situations, yet this power is not unlimited and cannot be exercised in an arbitrary and oppressive manner. In *State v. Loomis*, 115 Mo. 307, the court said:

“Classification for legislative purposes must have some reasonable basis upon which to stand. It must be

evident that differences which would serve for a classification for some purposes, furnish no reasons whatever for classification for legislative purposes. The differences which will support class legislation must be such as, in the nature of things, furnish a reasonable basis for separate laws and regulations. Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such classification for such a purpose would be arbitrary, and the piece of legislation despotism, therefore not the law of the land."

In *Gulf C. & S. F. Ry. Company v. Ellis*, 165 U. S. 150, the Supreme Court of the United States in holding invalid a statute of the State of Texas, which made railroad companies liable for attorney's fees in all cases for injury to stock, where the claim had remained unpaid for more than thirty days after the company had been notified thereof, stated the same doctrine as follows (p. 335) :

- "But it is said that it is not within the scope of the fourteenth amendment to withhold from states the power of classification, and that, if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, * * * yet it is equally true that such classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis."

If, therefore, the proposed amendment now under consideration provides a general regulation touching the public health applicable alike to all persons and businesses in the same class, or if it can be considered an ordinance prohibit-

ing secular business activities on Sunday applicable to all businesses of the same character, its validity, if passed, could not be questioned. On the other hand, if said proposed amendment is applicable to certain persons only, and arbitrarily discriminates against other persons in like situations, so far as terms and provisions of this ordinance are concerned, then said amendment would be unconstitutional and invalid. We are of the opinion that said amendment is arbitrary and discriminatory, whether the same be considered as a health regulation or as a prohibition of secular business on Sunday.

In *City of Chicago v. Netcher*, 183 Ill. 104, holding invalid as a health regulation an ordinance making it unlawful for any person, firm or corporation engaged in the sale of dry goods, clothing, jewelry and drugs to have exposed for sale or sell to any person any meats, butter, cheese, lard, fish, vegetables or any other provisions, the court said (p. 111):

“In order to sustain legislative interference with the business of the citizen by virtue of the police power it is necessary that the act should have some reasonable relation to the subjects included in such power. *If it is claimed that the statute or ordinance is referable to the police power the court must be able to see that it tends, in some degree, toward the prevention of offense or the preservation of the public health, morals, safety or welfare. It must be apparent that some such end is the one actually intended, and that there is some connection between the provisions of the law and such purpose. If it is manifest that the statute or ordinance has no such subject, but, under the guise of a police regulation, is an invasion of the property rights of the individual, it is the duty of the court to declare it void.*”

So also in *People ex rel. Lincoln Ice Co. v. City of Chicago*, 260 Ill. 150, the same court holding invalid as a health measure an ordinance prohibiting the location of any ice-making house or cooling plant within four hundred feet of any church, hospital, public or parochial school, said (p. 153):

“But it is said that the power to pass the ordinance in question is conferred by Clauses 78, 83 and 84 of Section 1 of Article 5 of the Cities and Villages Act. Clause

78 provides that the city shall have power to do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease. In the attempt to support the ordinance under this clause of the statute it is assumed that the establishment of an ice house or cooling plant is deleterious to the health of persons who are in churches, hospitals, public or parochial schools located within four hundred feet of such plant. There is no basis in this record for the contention that the inhibited occupations are dangerous to the public health. If the ordinance was designed to protect the public health it is strangely restricted as to the number and classes of persons who are to be protected against the dangers arising from the establishment of these plants. Persons who attend churches or schools are not generally supposed to be more susceptible to disease than the same persons would be in a railroad station, theater or other place where large numbers of people congregate. It would be absurd to say that it is unlawful to maintain an ice house or cooling plant within four hundred feet of a church or school because of the danger to the health of persons attending those places, and still the same business might be carried on next door to a department store in which there were as many, or more, people whose health would be endangered by the location of the plant. The ordinance cannot be sustained as a health measure."

Applying the principles stated in the above quotations to the provisions of the amendment now proposed, we think it does not appear from the terms of such amendment that prohibiting the sale of fresh meats or the keeping open of a meat market on Sunday, would be conducive to the public health or tend to suppress disease. We note also that the amendment distinguishes between those persons who observe the first day of the week as the Sabbath and those persons who conscientiously observe some other day of the week as the Sabbath. Such a distinction has many times been sustained in respect to ordinances regulating the observance of Sunday as a day set apart on account of the religious observances of the larger portion of the population, but we are unable to see how such a classification can be sustained in respect to an ordinance intended to promote public health.

It does not appear from the amendment that the sale of fresh meats on Sunday, by those who conscientiously observe some other day of the week as the Sabbath, would be in any way less dangerous to the health of the general public, than such sales would be if made by persons who observe Sunday as the Sabbath, nor does any reason appear why the Department of Health cannot make suitable arrangements for the inspection on Sunday of meat markets kept open by one class as well as the other.

If we consider the proposed amendment as an ordinance regulating business activities for the protection of the Sabbath, the same reasons appear for regarding it as discriminatory and arbitrary. In *Eden v. People*, 161 Ill. 296, the Supreme Court held invalid as discriminatory class legislation an act of the General Assembly which prohibited, under penalty, the keeping open of any barber shop on Sunday. The court said (p. 309):

“We do not, therefore, think the law was authorized by the police power of the State. If the public welfare of the State demands that all business and all labor of every description, except works of necessity and charity, should cease on Sunday, the first day of the week, and that day should be kept as a day of rest, the legislature has the power to enact a law requiring all persons to refrain from their ordinary callings on that day. (Coolsey’s Const. Lim. 725.) All will then be placed on a perfect equality, and no one can complain of an unjust discrimination. But when the legislature undertakes to single out one class of labor harmless in itself, and condemn that and that alone, it transcends its legitimate powers, and its action cannot be sustained” (p. 309).

We think this principle is applicable to the proposed amendment, no sufficient reason appearing why those persons who conduct meat markets are in a different category from other secular businesses, e. g., grocery stores, fruit and vegetable stores, etc. The cases mentioned above, in which ordinances regulating or prohibiting business activities on Sunday were sustained, are not inconsistent with the principle

herein stated, inasmuch as the ordinances considered in such cases prohibited all secular business activities except certain necessary activities, e. g., street railways, hotels, drug stores, etc., which appeared to the court to be in a different situation.

We conclude, therefore, that the proposed amendment, if passed, would be unconstitutional and invalid, and the same should therefore not be recommended by your Committee.

Very truly yours,

C. M. DOTY,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Aeroplanes Flying Too Close to Buildings Within the City Limits.

July 10, 1924.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

You have requested an opinion from this office relative to action which may be taken, if any, by your department to prevent aeroplanes from flying too close to buildings within the city limits.

In this connection, we desire to call to your attention, Sections 171, 172, 173 and 175 of The Chicago Municipal Code of 1922. Said sections are as follows:

“171. *Aircraft and other terms defined.*) For the purpose of this chapter the term ‘aircraft’ shall mean any airplane, hydroairplane, seaplane, dirigible balloon or other apparatus carrying one or more persons into or through the air, propelled by currents or by power or motors contained in said apparatus. The word ‘flight’

shall include every kind of locomotion by aircraft. 'A known, established, recognized field or place of landing' shall mean a public or private field or place of landing for such purpose where the landing of airplanes is permitted by the owners thereof and such fact is publicly known. An 'emergency place of landing' is any place where a landing may be effected in an emergency without endangering in any way life or property on such place of landing. 'Limits of the City of Chicago' shall mean the land or water within the city limits and the air over same.

172. *Prohibitions.*) No person shall guide any aircraft in a manner designed to give any demonstration of trick flying or stunt flying or aerial acrobatics, or give any manipulation of the controls which may tend to divert the aircraft from such a normal flight as is attended with every consideration for stability and safety.

No person shall fly over any part or section within the limits of the City of Chicago at a height lower than that enabling such aircraft to glide in any emergency and at all times to a known, established or recognized open or unobstructed place of landing on land or water, nor shall any person under any circumstances, special or otherwise, fly at a height lower than 2,000 feet except at the beginning or end of a flight.

No person in any aircraft shall cause or permit to be thrown out, discharged or dropped, any ballast, instruments, tools, containers, handbills, circulars, cards or other matter whatsoever, unless it be directly over a place established for that purpose, and all equipment carried in aircraft shall be adequately fastened in place before leaving the ground.

173. *Emergency.*) In case of emergency endangering the occupants of any aircraft a landing may be effected at an emergency place of landing, but such landing shall not be lawful while the aircraft is under full control.

175. *Penalty.*) Every person violating any of the provisions of this chapter shall be punished by a fine of not less than fifty dollars nor more than two hundred dollars for each offense."

The proper procedure for you to follow, in case complaints are received of aeroplanes flying lower than allowed by the aforementioned Section 172 of The Chicago Code, is to

ascertain the identity of the person so violating the ordinance and to swear out a complaint against him under the aforementioned sections.

Very truly yours,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

**Liability of Non-Consenting Frontage Owners On An
Improvement for Work Done by Private Contractor.**

July 14, 1924.

HON. JOHN J. SLOAN, President, Board of Local Improvements.

Dear Sir:

We have before us your letter of July 2d, asking for our opinion as to the rights of non-consenting frontage owners on an improvement put in under private contract when the contractor who did the work seeks to recover from the non-consenting frontage owners what he claims is their proportionate share of the cost for the work put in abutting their frontage.

Since the jurisdiction of the Board of Local Improvements over improvements by private contract is confined to furnishing specifications therefor, and inspecting the work as it progresses, in the matter of payments for such work, the Board has no responsibility.

This leaves the parties, namely, the contractor and the non-consenting frontage owners, so far as their legal rights are concerned, in the same position as though labor and materials were furnished by the contractor to the said non-con-

senting frontage owners, the owners denying having any agreement with the contractor for such, and the contractor claiming that without serving personal and formal notice of objection on him before it was done, these owners approved the work even though they did not contract for it, and thereby obligate themselves to pay a fair price therefor.

There is some language in the Illinois cases that would seem to support the contention of the contractors.

In *Highway Commissioners v. Bloomington*, 253 Ill. 164 at page 172, the court in discussing and distinguishing express and implied contracts, said:

“A familiar illustration of implied contract is, where one person, in the absence of any express agreement, renders valuable services to another which are knowingly accepted by such other, the law will imply a promise to pay a fair and reasonable compensation for such services.” Citing *McFarlane v. Dawson*, 125 Ala. 428.

In *McFarlane v. Dawson*, *supra*, an attorney recovered for services rendered on behalf of his client without an agreement as to the amount of his compensation, and also for work done after, but in connection with the legal duties for the performance for which he was originally retained.

In *Page on Contracts*, Second Edition, Volume 3, page 2470, Section 1444, appears a like statement:

“If the person for whom services of a kind usually made the subject of charge are rendered knows of their rendition, he is liable therefor, though he has made no express request, in the absence of special circumstances negating his liability.” Citing *Rockford Railway, etc. v. Wilcox*, 66 Ill. 417.

A study of the cases and the works of text writers where language similar to the above has been used reveals that in each case the person for whom the work was done knew that it was being performed, but gave no notice that if it were done, it would not be accepted, rather in each instance his very acts or his silence or his relation to the party performing were such as to lead the performer to believe that he could look to him for his pay.

The contractor, however, in the situation here under consideration is not so misled, for in advance of the work being done, he canvasses every frontage owner to get his or her signature to a contract for the improvement. It follows, therefore, that when any of the frontage owners refuse to sign, he knows who they are and that they will not be parties to the improvement. Nor can the contractor go back one step further and say that even though the non-consenting frontage owner may not have originally consented to the work being done, in fact may have forbade it being done, still by permitting the work to be put in without protest while it was being done, he has accepted the benefits and therefore becomes liable for its cost.

This proposition only applies where the party for whom the work was done may take the benefit of it or reject it. This alternative does not exist in the situation under consideration here, because an alley being affixed to realty is not susceptible of removal like a box or barrel, and further, being dedicated to the public use as a way, is, to the extent of the public easement absolutely beyond the frontage owner's control. He could not rip it up if he would, nor could the contractor proceed to recover the materials used in the alley, for it is no longer a chattel, it is a part of the realty, impressed with an easement in favor of the public.

As was said by the United States Supreme Court in *Colman v. United States*, 152 U. S., at page 99:

“We think that a promise to pay for services can only be implied when the court can see that they were rendered under such circumstances as authorized the party performing to entertain a reasonable expectation of their payment by the party benefited.”

Nothing appears here to warrant the impression that the party performing, namely, the contractor, could entertain a reasonable expectation of their payment by the party benefited because he knew from the first that the improvement was not wanted, and he should know that in laying an alley, dedicated to the public use, and affixed to the realty, he lost

all rights which he might otherwise have had to recover the thing in specie.

Should the contractor bring suit, a trial would follow, and judgment would be rendered on the facts as presented by sworn testimony. In order to present the strongest case the non-consenting frontage owners should come to court armed with a copy of a written protest sent directly to the contractor by registered mail together with the post office receipt for its delivery. This is advisable on account of the fact that written proof is stronger than oral proof, and would quite clearly show the true intent of the non-consenting frontage owner as evidenced by his statement to that effect over his signature. As a matter of policy for their own protection they should be advised to make formal protests and send them to the contractor by registered mail.

Very truly yours,

GEORGE F. HURLEY,

Approved: *Assistant Corporation Counsel.*

PHILIP J. McKENNA,

Attorney, Board of Local Improvements.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Overhead Passageway Maintained by the Northwestern
Elevated Railroad Company Connecting Platform
with Building at 209 South Wabash Avenue.**

July 15, 1924.

HON. U. S. SCHWARTZ, Chairman, Local Transportation
Committee.

Dear Sir:

We beg leave herein to reply to your letter relative to the overhead passageway connecting the elevated platform

at East Adams street and South Wabash avenue with the building at No. 209 South Wabash avenue. As stated in the letter of the Commissioner of Public Works, which accompanies your communication, said overhead passageway was built by the Northwestern Elevated Railroad Company under Permit H 51688 which was issued by the Honorable Charles R. Francis, then Commissioner of Public Works, in response to an application of said company, dated January 9, 1919.^o

The Wabash avenue side of the "Union Loop" was built by the Union Elevated Railroad Company under an ordinance passed by the City Council on October 14, 1895, and accepted by that company on October 21, 1895. Said structure was authorized and constructed with the intention that it should be used as part of the Union Loop and that cars and trains of the Union Elevated Railroad Company, the Northwestern Elevated Railroad Company, the Lake Street Elevated Railroad Company (Chicago and Oak Park Railroad Company), The Metropolitan West Side Elevated Railroad Company, and the Chicago and South Side Rapid Transit Railroad Company (South Side Elevated Railroad Company), might be operated thereon. The ordinance also expressly provided that the rights and privileges therein granted should extend to said companies, their successors and assigns. In 1901 all the property of the Union Elevated Railroad Company was sold and conveyed to the Northwestern Elevated Railroad Company, and all the stock of the Union Elevated Railroad Company was placed in trust for the Northwestern Elevated Railroad Company, which thereafter used all the rights and privileges granted to the Union Elevated Railroad Company.

Section 4 of said ordinance of October 14, 1895, contains the following provisions relative to the constructions of stations, stairways, etc.:

"The Union Elevated Railroad Company shall have permission and authority, and the same are hereby given and granted to it, to construct and maintain in the route hereby authorized, all necessary or proper stations, platforms and depot stations, and to connect the same with Wabash Avenue, by means of all necessary stairs, stair-

ways, elevators, landing places and other constructions and appliances for ingress, egress and the accommodation of passengers; but such platforms, stations, stairs, stairways, elevators, landing places, etc., shall be so constructed and maintained as not to unnecessarily impair the usefulness of such avenue, or any portion thereof.

* * * The permission and authority to locate, construct and maintain all such requisite platforms, landings and lines of stairs leading to and from the sidewalks of the street and avenue, and the said elevated stations, being herein expressly granted said company, whenever and wherever such methods of reaching said stations may be found necessary.

*"Nothing herein contained, however, shall prohibit said company from locating and maintaining its stations in buildings which it may purchase, lease or erect on grounds purchased or acquired by condemnation or lease, wherein it may for the convenience and comfort of its patrons place its ticket offices, waiting rooms, sanitary accommodations, stairways, elevators and all requisite methods of ingress or egress, and the right to construct and maintain covered passageways or connections between the interior of all such station buildings and the exterior platforms, is hereby expressly granted to said company. * * * The plans and specifications of such depots, platforms and stairs shall be submitted to and approved by the commissioner of public works before the work of construction thereof shall have commenced."*

No question could therefore arise concerning the right and authority of the Northwestern Elevated Railroad Company, with the permission of the Commissioner of Public Works, to construct the overhead passageway hereinbefore referred to, if it were not for the fact that the building at No. 209 South Wabash avenue or so much thereof as is served by the overhead passageway is being used exclusively as a passenger station for the Chicago North Shore and Milwaukee Railroad Company, under and in accordance with a contract between that company and the Northwestern Elevated Railroad Company, dated March 31, 1919. In an opinion of the Law Department, dated November 1, 1923, we held that the operation of the cars and trains of the North Shore

Company over the structures of the elevated railroad companies south of Wilson avenue was without lawful consent of the City of Chicago and to the extent that such structures are in or along streets and public ways the operation of such cars and trains was a usurpation of the use of such streets and public ways.

It is our opinion, however, that the right of the Northwestern Elevated, under the ordinance above quoted, to construct and maintain said overhead passageway and the responsibility of said company for permitting said passageway when constructed to be used in an improper and unauthorized manner are separate and distinct. We have no doubt that the Northwestern Elevated by consenting to and co-operating in the unlawful use of its right of way and structures by the North Shore Company has violated the conditions and restrictions contained in its ordinance grants and is properly responsible therefor. We think, however, that its right and authority to construct and maintain the passageway as part of the physical structure of its elevated station is not impaired thereby.

We are, therefore, of the opinion that the use of such passageway by the North Shore Company is an element in the general controversy now existing relative to the status of the North Shore Company in the operation of its cars and trains south of Wilson avenue and the Committee should make it part of any general settlement that may be arrived at in respect to that controversy.

Yours very truly,

C. M. DOTY,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Location of East Roosevelt Road Subway.

July 15, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Déar Sir :

Your communications of May 9th and May 19th, 1924, addressed to the Corporation Counsel, also your communication of May 14, 1924, addressed to Mr. Dupee of the Corporation Counsel's staff, have been referred to me for consideration and reply.

In the matter of the location of the East Roosevelt Road Subway, the so-called Lake Front Ordinance (Council Proceedings of July 21, 1919, page 973) provides :

“*Section 5. AGREEMENTS BY CENTRAL COMPANY AND MICHIGAN CENTRAL RAILROAD COMPANY. The Central Company * * * agrees :*

f. Park Approaches. That the Central Company shall permit the Commissioners to construct and maintain, across the lands of the Central Company, to the lands of the Commissioners lying eastwardly thereof, the following Park Approaches, or Park Approach viaducts and subways, viz.: And East Roosevelt Road Viaduct, * * * all at the respective locations described in Schedule II, (p. 990) hereby made a part hereof, and in accordance with specifications B, (p. 992) covering the construction of viaducts and subways, respectively, and at the elevations prescribed in said Specifications and on Plan K (plat) hereby made a part of this ordinance. Provided the Central Company shall not be liable for the cost of construction of the viaducts and subways for such Park Approaches or any damages to private property occasioned thereby.

And that the Central Company shall permit the construction of a subway for Local Transportation Lines under the lands of the Central Company into the lands of the Commissioners, substantially as shown on Plan K, and at the elevations therein prescribed and in accordance with Specifications B.”

"SPECIFICATIONS B.

VIADUCT AND SUBWAYS.

* * * * *

The viaduct and approach on East Roosevelt Road shall be constructed to the full width of one hundred and eighteen (118) feet with sidewalks on each side and a driveway not less than seventy-five (75) feet in width; and provision shall be made for the subway for Local Transportation Lines and pedestrian passageways or platforms for connections to the Central Company's Station, as provided for in Section 7 of this ordinance."

"SCHEDULE II. LOCATION OF EASEMENT FOR HARBOR AND
CERTAIN PARK APPROACHES. EAST ROOSEVELT
ROAD.

The easement for the construction of the East Roosevelt Road Viaduct shall be one hundred and eighteen (118) feet wide and shall lie between the north and south lines of East Roosevelt Road, as widened, extended east across the right of way and lands of the Central Company, and between the westerly line of its right of way and the easterly boundary of its lands.

The center line of said easement shall coincide with the center line of East Roosevelt Road, as widened, extended eastwardly.

The easement for the Subway for Local Transportation Lines at East Roosevelt Road shall be fifty (50) feet in width and shall be located north of and contiguous to the easement for the East Roosevelt Road Viaduct and shall extend from the westerly line of the right of way of the Central Company to the easterly boundary of its lands."

"SECTION 7. MANNER IN WHICH EASEMENT RESERVED
SHALL BE ENJOYED—CONSTRUCTION AND USE
OF RAILROAD CONNECTIONS—CONSTRUCTION AND EXPENSE OF EAST ROOSEVELT ROAD SUBWAY.

It is hereby made an express condition to the enjoyment of said easements for access for Harbor Approaches and Railroad Connections, described in Section 2, and for the Park Approaches described in Clause f of Section 5, that the same shall be used and enjoyed, respectively, as harbor approaches for street purposes, for rail-

road purposes, and for access to the lands of the Commissioners, over and across the lands of the Central Company, only upon the completion of viaducts or subways as prescribed in Sections 2, 5 and 6, in accordance with Specifications B; and upon condition that the said easements, in so far as they affect lands of the Central Company, shall only be used or enjoyed upon or over the viaducts or through the subways so constructed.

* * * * *

The Subway for Local Transportation Lines and the pedestrian passageways or platforms in connection therewith at East Roosevelt Road shall be constructed by the City or under its authority, as provided for by ordinance for that purpose, and substantially as shown on Plan K, *with such modifications of said plan within its general scope as may be determined by the City. Provided, however, that such modifications shall not alter or require the alteration of the location or grades of the tracks or other structures of the Central Company without its consent.* * * *

An examination of Plan K (plat) attached to and made a part of said ordinance in which plan the subway is sketched off north of the north line of Roosevelt Road discloses the following legend written on the face of the plan: "These tracks to be located under East Roosevelt Road and as near the Illinois Central Station as practicable."

The foregoing legend, when considered in connection with the above quoted provisions of the ordinance, clearly indicates the anticipation of a probable necessity of "modification of said plan within its general scope" and provides for such modification.

You will note that the ordinance provides that the Central Company shall permit the Commissioners to construct a viaduct across the lands of the Central Company on East Roosevelt road and shall permit the construction of a subway under its lands into the lands of the Commissioners "*substantially as shown on Plan K.*" Specifications B (page 992) provide that the viaduct and approach shall be to the full width of 118 feet with sidewalks on each side and a driveway

not less than 75 feet in width, and provision is also made for the subway.

Schedule II provides for the easement for the viaduct on East Roosevelt road as extended and also provides for an easement 50 feet in width for the subway immediately north of and contiguous to the easement for the viaduct.

Section 7 (page 975) provides for the construction of the subway by the City or under its authority "*substantially as shown on Plan K with such modifications of said plan within its general scope as may be determined by the City. Provided, however, that such modifications shall not alter or require the alteration of the location or grade of the tracks or other structures of the Central Company without its consent.*"

We are advised that the proposed construction of the subway under the proposed viaduct in East Roosevelt road will "not alter or require the alteration of the location or grade of the tracks or other structures of the Central Company"; that such construction and installation can probably be made more expeditiously and at less cost as a whole than if the original plan is adhered to. We find no legal objections to the proposed change in location and construction. However, in our opinion such proposed change should be approved by the Central Company and by the Commissioners, as well as by the Commissioner of Public Works before work thereon is commenced.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Concurred in:

EUGENE H. DUPEE,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Power of Mayor to Refuse Licenses for Maintenance of Soft Drink Stands.

July 16, 1924.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

You have requested the Corporation Counsel for an opinion as to whether or not a license for the operation of soft drink and refreshment stands on private property between 71st and 79th streets may be refused, and whether any such license, if issued, can be revoked.

The ordinance requiring a license for soft drink and refreshment stands is known as retail beverage dealers ordinance and is comprised in Sections 3464-3469 of The Chicago Municipal Code of 1922. The sections relating to the application for such a license and to the revocation of such license are as follows:

“3467. *Application—special requirements.*) Any person, firm or corporation now engaged in the business of a retail beverage dealer or desiring to engage in the business of a retail beverage dealer as defined in this article shall make application in writing for a license so to do which shall conform to the general requirements of this ordinance relating to applications for licenses. Such application shall also state the length of time that said applicant, if an individual, has resided in the city, his place of previous employment, whether married or single, whether he has ever been convicted of felony or misdemeanor, and whether he has been summoned to court in a criminal proceeding, which statement shall be signed and sworn to by the applicant and filed with the city collector as a permanent record. The city collector shall forward the application to the superintendent of police for investigation. The investigation of all applications for licenses under the provisions of this article shall be conducted under the supervision of the captain

of the police district in which the applicant shall reside, and when such investigation is completed the application shall be forwarded by the captain to the office of the superintendent of police, who, if such investigation proves satisfactory, shall indorse his recommendation thereon and forward the same to the city collector. No license shall be issued to any person under the provisions of this article who has been convicted of a felony."

"3468. *Suspension—revocation.*) Any individual, licensee or corporation who shall permit a violation of the city ordinances within said licensed establishment shall for the first violation have his license suspended by the mayor for a period of thirty days, for the second violation for a period of sixty days, and upon the third violation said license shall be revoked by the mayor and the license of said applicant shall not again be restored; provided, however, that the mayor shall have the right, in his discretion, to revoke said license upon the first or second violation."

If any of the foregoing requirements of the retail beverage dealers ordinance are not complied with, or if upon the investigation provided for in Section 3467 the Superintendent of Police reports that the applicant is not satisfactory, then, clearly, the Mayor has the discretion to refuse to issue the license. If, however, it appears that all of the requirements of the ordinance are complied with, and if it further appears that the report of the investigation of the applicant by the Superintendent of Police be satisfactory, the question then arises whether the Mayor has any discretion to refuse the license for good cause.

In considering this question, the provisions of Section 2425 of the Code containing general license requirements, is important. Said section is as follows:

"2425. *Mayor to exercise discretionary power.*) In all cases where it is not otherwise expressly provided, the mayor shall have power to hear and grant applications for licenses upon the terms specified by this ordinance; and all licenses shall be issued to such person or persons as shall comply in all respects with the provisions of this ordinance *and as the mayor in his discretion shall deem suitable and proper persons to be licensed.*"

Our Supreme Court has held in recent cases that even though an ordinance reserves no discretionary power to the Mayor, nevertheless, the Mayor will not be compelled to issue a license, when, in his discretion, reasonably and fairly exercised, the license has been refused. In the case of *Harrison v. The People*, 222 Ill. 150, all the requirements of the ordinance of the City regulating the granting of licenses to keep dram-shops had been complied with. Nevertheless, the Mayor refused the license on the ground that the proposed dram-shop was to be located next door to a school building. The court, at page 153, said:

“Of course, where an ordinance authorizes the issuing of a license to keep a dram-shop upon certain terms and conditions, the authorities authorized to grant the license cannot arbitrarily refuse the same, nor discriminate between persons, places and regulations pertaining to the business, without reasonable grounds therefor. (*Zanone v. Mound City*, 103 Ill. 552.) We are, however, of the opinion that there is vested in such authorities, unless expressly restricted by the language of the ordinance, a discretionary power, which may be reasonably exercised in the granting or refusing to issue a license. The question does not seem to have been directly passed upon by this court, but the authorities from other states fully sustain this reasonable construction. In many of these cases the language of the law or ordinance authorizing the granting of the license is, that upon the doing of certain things the licensing officer or body shall grant the license; but the decisions are to the effect that nevertheless a discretion exists in such officer or body, and that they will not be compelled to issue a license when in their discretion, reasonably and fairly exercised, the license has been refused. (*Leighton v. Maurey*, 76 Va. 865; *People v. Board of Excise*, 61 N. Y. Sup. 798; *Sherlock v. Stuart*, 96 Mich. 193; *Attorney General v. Justices*, 27 N. C. 315; *Muller v. Commissioners*, 89 *id.* 17; *Hillsboro v. Smith*, 110 *id.* 417; *Perry v. Salt Lake City*, 7 Utah, 143; *Eslinger v. East*, 100 Ind. 434.)”

The Supreme Court has followed this decision in the case of *Nahser v. City of Chicago*, 271 Ill. 288.

Although it is clear that the Mayor cannot exercise capricious or arbitrary power in withholding a license when

the provisions of an ordinance have been complied with, nevertheless, under the ruling of the Supreme Court in the case of *Harrison v. The People, supra*, we are of the opinion that, for good cause, the Mayor may refuse to issue the license. As to the question of what constitutes good cause, the mere fact that the location of the proposed soft drink parlor would be unsightly or cause the particular neighborhood to depreciate, would not in our opinion be sufficient cause.

In view of the fact that a soft drink establishment, conducted in a lawful manner, does not ordinarily tend to create a nuisance, gatherings of intoxicated people or other conditions conducive or tending to disturb the public peace, it is doubtful whether the Mayor would have good ground in any event for refusing such a license (providing, of course, the provisions of the ordinance were complied with). But should such a situation arise, where the Mayor clearly had good and justifiable grounds for refusing the license, we are of the opinion that the Mayor would be justified in refusing the license, despite the fact that all the conditions of the ordinance were complied with. Section 2411 of said Code provides as follows:

“2411. *Revocation of license.*) If at any time after the granting of any license, any department head shall certify to the mayor that the licensee is violating any of the ordinances of the City of Chicago or any of the statutes of the State of Illinois in the conduct of his business, the mayor shall have the power to revoke the license therefor.”

According to the provisions of the foregoing ordinance, a license may be revoked for a violation by the licensee of an ordinance or statute.

It is possible that the operation of a soft drink parlor upon the premises might be prohibited by the provisions and restrictions of the zoning ordinance. In your communication you do not state the location of the particular property in question, other than by describing it as private property between 71st and 79th streets. If you desire an opinion from this department relative to the question of whether or

not a soft drink and refreshment stand can be operated in the particular locality under the provisions of the zoning ordinance, will you kindly render us a supplemental communication, giving the exact location of this property?

Very respectfully,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Procedure to Require Surface Lines to Build Extensions—Order by Illinois Commerce Commission.

July 17, 1924.

HON. U. S. SCHWARTZ, Chairman, Local Transportation Committee.

Dear Sir:

We return herewith your letter of October 29, 1923, in which you ask, "whether it will be necessary for the City to make an application to the Illinois Commerce Commission for an order directing the Surface Lines to make extensions in accordance with the mandatory ordinances passed by the City Council in the future."

At the time said letter was received, the City Council had not taken the necessary steps to comply with the terms and provisions of the Street Railroad Act and the Cities and Villages Act in ordering the compulsory street railway extensions provided for in Section 3 of the Settlement Ordinances, i. e., no orders had been passed indicating the intention of the City Council to require the construction of specified extensions, no frontage consents had been secured, no public notices had been published and no ordinances had been passed

authorizing the use of city streets for the construction of such extensions. In fact, the whole program and plan for securing the 1924 quota of compulsory street railway extensions was undetermined and undeveloped, and any attempt to answer the abstract question presented seemed premature.

Since that time the plan has been worked out, the City Council has passed the necessary orders and ordinances, the whole plan has, in fact, been presented to the Illinois Commerce Commission by the City's petitions, and nine out of twelve extensions have been fully ordered, while three others are pending for hearing before the Commission relative to the public demand therefor and the service and convenience to be served by them, if constructed. No further answer to your question, therefore, seems to be needed.

We also return herewith your letter dated November 5, 1923, transmitting an order introduced by Alderman Thomas F. Byrne relative to through route street railway service on South Robey street. Your letter indicated that, if necessary, the matter should be presented to the Illinois Commerce Commission.

Investigation, however, showed that increased shuttle service on South Robey street from West 47th street to West 63d street should be a more practical solution of the transportation problem presented by the people along South Robey street than through route service. On our representations and those of the Department of Public Service the Chicago Surface Lines provided such increased service. We have held your communication since that time to await developments, and no further complaints being made, we are, with the consent of Alderman Byrne, returning your letter and the accompanying order.

Very truly yours,

C. M. DOTY,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Whether Board of Local Improvements May Put
Through a System of Alley Pavements Which Are
Not Connecting, as a Single Improvement.**

July 17, 1924.

HON. JOHN J. SLOAN, President, Board of Local Improvements.

Dear Sir:

In your letter of July 2, 1924, you ask us whether the Board of Local Improvements may legally put through a system of alley pavements when the alleys are not directly connected, although situated in adjacent blocks.

It has been frequently decided by our Supreme Court that several projects may be embraced in a common scheme as one improvement and that the similarity of the improvements proposed to be made, and the situation of the property to be assessed with respect to it, form a better test as to its singleness than their actual connection or physical contact with one another. *City of Springfield v. Green*, 120 Ill. 269.

But, in *Davis v. City of Litchfield*, 145 Ill. 313, the court limits the scope of the taxing body in making local improvements under a system based on similarity by saying that the limits of the improvement should be so fixed that the property to be taxed shall receive some benefit from the proposed improvement. So if the combination of streets or alleys should be so separate and distinct that the making of one could not reasonably be said to benefit property situated upon the other, their combination would be clearly in violation of the rule that improvements must be single.

The question then is largely one of fact. How far can a system of alley improvements be extended so that the prop-

erty to be taxed for it shall receive some benefit from the whole improvement? The practice has been not to assess benefits beyond the block in which the alley is situated, and this practice would seem to be supported by reason, for while an alley is like a street in being a public way, it differs from a street because in fact, it is only a way for the purpose of serving the property abutting on it. It is therefore a purely local improvement and its benefit to non-adjacent property is so slight as to be incapable of estimation when compared to streets where the benefit operates directly upon the whole neighborhood in making it open to general ingress and egress.

The fact that the alleys in the system may not be in actual physical connection or contact, will not make the improvement double. The real basis for determining whether it is double is whether the system is a unit as to benefits, so the Board should satisfy itself before proceeding to put through such a system that benefits follow to all the property assessed from the improvement as a whole, and that the improvement of each alley is an improvement beneficial to all the others. If this can be shown the improvement is single, and can be supported in law.

Very truly yours,

GEORGE F. HURLEY,
Assistant Corporation Counsel.

Approved:

PHILIP J. McKENNA,
Attorney, Board of Local Improvements.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Interpretation of Auctioneer's Ordinance—Procedure
When Assistant Auctioneers Named in the License
Dies or Leaves Employment of Auctioneer.**

July 17, 1924.

HON. THOMAS P. KEANE, City Collector.

Dear Sir:

You have advised the Corporation Counsel that you are in receipt of a communication from the law firm of Krauss, Goldman & Allshouse, requesting an interpretation of the auctioneers' ordinance relative to the procedure to be followed when the "assistant auctioneer," named in the license, dies or leaves the employment of the auctioneer.

Section 223 of The Chicago Municipal Code of 1922, which provides that an auctioneer may name an "assistant auctioneer" in his application, who shall be permitted to conduct auctions in place of the licensee, reads as follows:

"223. Auctioneer to designate partners and assistants, if any.) Every person licensed as an auctioneer shall, at the time he receives his license, file with the city clerk, a statement in writing, signed by him, designating his partner or partners, if any, and he may also designate a clerk that he desires to name as an assistant.

At the time of the issuance of the license the city clerk shall incorporate the name of one other person who has been thus named either as a co-partner or clerk, and certify that said co-partner or clerk shall be known as an 'assistant auctioneer,' who may act as an auctioneer in place of the licensee.

If any licensed auctioneer shall permit any other person than the one designated as his assistant to hold an auction sale in his name he shall be deemed guilty of a violation of this ordinance and his license shall forthwith be revoked. Any auctioneer who allows any other person than the one mentioned in his license as an 'assistant' to sell under his license shall be deemed guilty of a violation of this ordinance, and said license shall

forthwith be forfeited and no other license shall be issued to him for a period of one year."

The first paragraph of said section provides that an applicant for an auctioneer's license shall designate his partner or partners, if any, and also a clerk that he desires to name as "assistant." In our opinion this paragraph does not mean that the partner or partners may also act as "assistant auctioneers." The requirement that the names of the partner or partners be given, is merely a requirement for the purpose of obtaining particular information concerning the business to be licensed. The second paragraph of said section makes this intention clear when it provides that one other person, either a co-partner or clerk, may be designated as the "assistant auctioneer" who may act as an auctioneer in place of the licensee. Taken together, the meaning of the two paragraphs of this section is clear. The applicant must state the names of his partner or partners, if any, and he may, if he so wishes, designate any one of said partners or a clerk to act as "assistant auctioneer."

There is no provision in said ordinance for the procedure to be followed in case the "assistant auctioneer," designated as such in the license, dies or leaves the employment of the licensee or, if he be a co-partner, leaves the partnership. For the purpose of ascertaining the proper procedure to be followed under such circumstances, it is well to bear in mind Section 1002 of the chapter of The Chicago Municipal Code of 1922 containing general provisions for the interpretation of the entire Code. Said section is as follows:

"1002. Intent.) All general provisions, terms, phrases and expressions contained in this ordinance shall be liberally construed in order that the true intent and meaning of the city council may be fully carried out."

Section 226 of the auctioneers ordinance provides that "no license granted under the provisions of this chapter shall be transferred." However, we are of the opinion that the substitution of an "assistant auctioneer" is not a transfer of the license. It would be very unreasonable and work

a great hardship to construe the ordinance to mean that whenever a clerk who has been named as "assistant auctioneer" leaves the employment of the licensed auctioneer, that said auctioneer is not entitled to substitute another clerk. Such an interpretation would, in our opinion, violate the meaning and intent of the ordinance as expressed in the aforequoted Section 1002.

In conclusion, it is our opinion, that whenever a licensed auctioneer notifies the City Collector that the clerk or co-partner formerly named in the license as "assistant auctioneer" has left the employment or business of the licensed auctioneer, the City Collector shall substitute the name of the new clerk or co-partner to act in place of the former.

Yours very truly,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Discretion of Inspector of Weights and Measures in Issuing Public Weighmasters' Licenses.

July 18, 1924.

HON. CARMEN VACCO, Inspector of Weights and Measures.

Dear Sir:

You have requested the Corporation Counsel for an opinion relative to what right, if any, the Inspector of Weights and Measures has to exercise discretion in the granting of public or deputy weighmaster's licenses. The sections of the public weighmaster's ordinance relative to the appointment of weighmasters and relative to applications for such appointments are as follows:

"4195. *Appointment.*) Any person, firm or corporation owning a scale or scales suitable for weighing any commodity, produce or articles of merchandise in load lots, when contained in any wagon, auto truck or other vehicle, or in any quantity less than load lots when not contained in any wagon, truck or other vehicle, shall be eligible for appointment as a public weighmaster in the City of Chicago upon complying with the provisions of this article."

"4196. *Application—bond—license fee.*) Any person, firm or corporation desiring to be licensed as a public weighmaster, shall file an application in writing therefor which shall conform to the general requirements of this ordinance relating to applications for licenses, and shall set forth the location of the place of business for which such license is requested. Such applicant shall also execute and present therewith a bond in favor of the City of Chicago in the sum of two thousand dollars, with such sureties as may be approved by the comptroller, conditioned for the faithful performance of such applicant's duties as a public weighmaster, and for the payment by such public weighmaster of any fine or fines which may be imposed upon him, them or it for any violation of said applicant's duties as such public weighmaster. Upon payment to the city collector of the sum of twenty dollars as an annual license fee, the mayor may issue a license authorizing such applicant to act as a public weighmaster."

If any of the foregoing requirements of the public weighmaster's ordinance are not complied with, or if the sureties on the bond presented are not approved by the comptroller, the Mayor may refuse to issue the license. If, however, it appears that all of the requirements of the above ordinance are complied with, the question then arises whether the Mayor has any discretion to refuse the license for good cause.

In considering this question, the provisions of Section 2425 of the Code containing general license requirements, is important. Said section is as follows:

"2425. *Mayor to exercise discretionary power.*) In all cases where it is not otherwise expressly provided, the mayor shall have power to hear and grant applications for licenses upon the terms specified by this ordi-

nance; and all licenses shall be issued to such person or persons as shall comply in all respects with the provisions of this ordinance *and as the mayor in his discretion shall deem suitable and proper persons to be licensed.*"

Our Supreme Court has held in recent cases that even though an ordinance reserves no discretionary power to the Mayor, nevertheless, the Mayor will not be compelled to issue a license, when, in his discretion, reasonably and fairly exercised, the license has been refused. In the case of *Harrison v. The People*, 222 Ill. 150, all the requirements of the ordinance of the City regulating the granting of licenses to keep dram-shops had been complied with. Nevertheless, the Mayor refused the license on the ground that the proposed dram-shop was to be located next door to a school building. The court, at page 153, said:

"Of course, where an ordinance authorizes the issuing of a license to keep a dram-shop upon certain terms and conditions, the authorities authorized to grant the license cannot arbitrarily refuse the same, nor discriminate between persons, places and regulations pertaining to the business, without reasonable grounds therefor. (*Zanone v. Mound City*, 103 Ill. 552.) We are, however, of the opinion that there is vested in such authorities, unless expressly restricted by the language of the ordinance, a discretionary power, which may be reasonably exercised in the granting or refusing to issue a license. The question does not seem to have been directly passed upon by this court, but the authorities from other states fully sustain this reasonable construction. In many of these cases the language of the law or ordinance authorizing the granting of the license is, that upon the doing of certain things the licensing officer or body shall grant the license; but the decisions are to the effect that nevertheless a discretion exists in such officer or body, and that they will not be compelled to issue a license when in their discretion, reasonably and fairly exercised, the license has been refused. (*Leighton v. Maurey*, 76 Va. 865; *People v. Board of Excise*, 61 N. Y. Supp. 798; *Sherlock v. Stuart*, 96 Mich. 193; *Attorney General v. Justices*, 27 N. C. 315; *Muller v. Commissioners*, 89 *id.* 17; *Hillsboro v. Smith*, 110 *id.* 417; *Perry v. Salt Lake City*, 7 Utah, 143; *Eslinger v. East*, 100 Ind. 434.)"

The Supreme Court has followed this decision in the case of *Nahser v. City of Chicago*, 271 Ill. 288.

Although it is clear that the Mayor cannot exercise capricious or arbitrary power in withholding a license when the provisions of an ordinance have been complied with, nevertheless, under the ruling of the Supreme Court in the case of *Harrison v. The People*, *supra*, we are of the opinion that, for good cause, the Mayor may refuse to issue the license. As to the question of what constitutes good cause, we are of the opinion that there must be a very strong and sufficient reason for the withholding of a license. If the applicant had been formerly *convicted* of the offense of short weight, or some similar offense, and if he were of such character that he might reasonably be expected to repeat the offense, these facts would, in our opinion, constitute sufficient cause.

In reading this opinion, there should be borne in mind the fact that at the present time an injunction is still in full force and effect which was issued in the case of *American Sand and Gravel Co. v. City of Chicago*, restraining the City from enforcing the public weighmaster's ordinance as against the persons who were complainants in that case. In view of the recent ruling of the Illinois Supreme Court in the case of *City of Chicago v. Wisconsin Lime and Cement Co.*, 312 Ill. 520, a motion to dissolve the aforementioned injunction is now pending. Prior to the dissolution of said injunction, however, you should not interfere with any of the public weighmasters who are parties in the *American Sand and Gravel Co.* case. As to all persons who are not parties in said case you have the power to enforce the public weighmaster's ordinance and to refuse or approve applications for a license under the procedure outlined in the first part of this opinion.

Very respectfully,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Control Over Building Within Right of Way of
Sanitary District.**

July 18, 1924.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

We have your communication concerning the proposed construction of a building within the limits of the City on the right of way of the Sanitary District of Chicago, to be used as a stable, and you raise the question whether or not your department has jurisdictional powers over the same because of the territorial domain of another public corporation being involved.

In the case of *County of Cook v. City of Chicago*, 311 Ill. 234, decided in February of this year, the court was of the opinion "that in enacting Paragraph 63 of Article 5 of the Cities and Villages Act, and in using the language, 'and to cause all such buildings and inclosures as may be in a dangerous state to be put in a safe condition,' the legislature intended to confer upon the City Council such power over *all* of the buildings erected within the city as the words there indicate, including those of the county *or other municipalities* located therein." (Italics ours.)

This decision therefore conclusively sets aside all doubt of the City's authority to regulate the construction of buildings within its corporate limits.

Particularly would this be true, where, as in this case, the property involved is one used for private, rather than public purposes, and, except as a revenue producer, has no connection with the functions of the Sanitary District of Chicago.

You are therefore advised that your department has the same jurisdiction over the proposed structure that it has over similar structures anywhere in the City of Chicago.

Very truly yours,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Power of Commissioner of Public Service to Inspect
Rolling Stock of Elevated Lines to Ascertain Its
Condition From Point of View of Public Safety.**

July 18, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We beg leave to reply herein to your letter of May 15th, relative to certain complaints that you have received respecting apparent structural weaknesses in the cars operated on the elevated railroads as evidenced by squeaking, cracking and breaking noises made by such cars when rounding curves or otherwise subjected to strains. In such letter you ask our opinion whether you have any jurisdiction or right of intervention in the premises, i. e., whether you may cause said cars to be inspected or otherwise take steps to assure the public safety in event such apparent weaknesses should prove to be real.

We have carefully examined all the special or contract ordinances which authorized the construction of the elevated railroad structures in the city or any part thereof and provide for the operation of cars and trains of cars thereon as the same are now operated, and we have been unable to find

therein any provisions or conditions on which such jurisdiction can be predicated. All the provisions contained in said ordinances relative to inspections under the authority of the Commissioner of Public Works or requiring said elevated railroads to be maintained subject to the approval of the Commissioner of Public Works relate to the elevated railroad structure itself and the stations, platforms and stairways connected therewith, or to the use of the public streets and ways by said elevated railroads and the care and maintenance of such ways and streets.

Turning now from such special or contract ordinances to the general provisions contained in The Chicago Municipal Code of 1922, and the amendments thereto, we find the following pertinent language in Section 3148:

“The commissioner of public service shall receive all complaints against any public utility relating to any service, product or commodity furnished or supplied to the city, or the inhabitants thereof, or relating to any rate, charge or toll, collected or demanded therefor, or relating to the safety, health, comfort or convenience of the public, patrons or employes of any public utility, and shall investigate and examine the grounds of all reasonable complaints, and take such proceedings and action in respect to such complaints, for the purpose of adjusting the same, as the circumstances may warrant or require, and shall file a monthly report with the city council of all complaints received and adjusted, and of all complaints received and investigated which the public utility or public utilities concerned refuse to adjust together with the grounds of refusal therefor. He shall investigate and report monthly to the city council upon all alleged violations of the laws of the State of Illinois which take place within the corporate limits or jurisdiction of the city, and upon all alleged violations of the ordinances, orders and resolutions of the city council, in respect to public utilities, *and he shall investigate and report monthly to the city council upon all accidents happening in connection with the equipment, plant, appliances, rolling stock or other property of any public utility whenever by him deemed to be advisable and in the interest of the city or the inhabitants thereof.*”

We are, therefore, of the opinion that whatever authority exists in the City to cause said elevated railroad cars to be inspected or otherwise to take steps to assure the public safety against the results of structural weaknesses in such cars (we do not in this opinion attempt to define the extent of such authority) arises from the general police powers of the City as the same may be exercised from time to time by general ordinances, and that the duty of watching over the enforcement of such ordinances is vested—so far as such duty has been vested by the City Council in any executive department of the city government—in the Commissioner of Public Service.

Very truly yours,

C. M. DOTY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Pension Rights of Policeman Who Left Service Prior to January 1, 1922, and Was Later Reinstated.

July 19, 1924.

MR. GEORGE C. SIKES, Secretary, Policemen's Annuity and Benefit Fund.

Dear Sir:

I am in receipt of your letter of July 11, 1924, inquiring as to the pension rights of Sergeant Edward T. Davis, and stating that Mr. Davis was discharged before January 1, 1922, and was reinstated since that date.

Section 36 of the Policemen's Annuity and Benefit Fund Act provides that a policeman who shall not be in the police

service of the City on December 31, 1921, and who was in such service prior to that date, and who shall re-enter the service after that date, and before attainment of the age of fifty-seven (57) years, shall not have any right to be credited with any sum or sums for prior service annuity and widow's prior service annuity purposes on account of any service rendered prior to January 1, 1922, and that such policeman shall not have any right to *prior service annuity*, and the wife or widow of such policeman shall not have any right to widow's prior service annuity; but that the period of service rendered by any such policeman prior to January 1, 1922, shall be included in computing the term of service of such policeman for age and service annuity and widow's annuity purposes.

Section 49 of the Policemen's Annuity and Benefit Fund Act provides that in computing the term of service rendered by any policeman prior to January 1, 1922, there shall be counted in addition to all periods of time during which such policeman shall have performed the duties of his position, the following: All periods of vacation, all periods of leave of absence with whole or part pay, all periods of leave of absence without pay which were necessary on account of disability.

As to whether or not the *amount* of pension that Mr. Davis would be entitled to be paid is affected by any other provision of the Policemen's Annuity and Benefit Fund Act need not be passed upon at this time as Mr. Davis is not an applicant for pension.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Letting of Contracts by Board of Local Improvements
for Greater Sum Than Estimated Cost and Judgment of Confirmation—Not a Violation
of the Criminal Code.**

July 22, 1924.

MR. EDWARD J. GLACKIN, Secretary, Board of Local Improvements.

Dear Sir:

Your attention is directed to Section 208, Chapter 38, Hurd's 1919 Statutes, which reads as follows:

"208. OMISSION AND MALFEASANCE. Every person holding any public office (whether state, county or municipal), trust or employment, who shall be guilty of any palpable omission of duty, or who shall be guilty of diverting any public money from the use or purpose for which it may have been appropriated or set apart by or under authority of law, or who shall be guilty of contracting directly or indirectly, for the expenditure of a greater sum or amount of money than may have been, at the time of making the contracts, appropriated or set apart by law or authorized by law to be contracted for or expended upon the subject-matter of the contracts, or who shall be guilty of willful and corrupt oppression, malfeasance or partiality, where no special provision shall have been made for the punishment thereof, shall be fined not exceeding \$10,000, and may be removed from his office, trust or employment.—R. S. 1845, p. 170, Chap. 110; *Gunning v. People*, 86 App. 174."

This section of the Criminal Code has been the subject of several discussions between yourself, Mr. Charles Haft and the writer, in an effort to discover whether it prohibits your department from letting contracts for local improvements where the amounts of the contracts exceed the estimated cost of the Engineer of the Board and the amounts of the judgments of confirmation of the roll entered by the court.

Mr. Haft contends that in neither case is the Board authorized to award the contract until the deficiency is provided for by a supplemental assessment levied in accordance with the Local Improvement Act.

The prohibition of the statute is against the expenditure of a greater sum of money than is at the time of the making of the contract (a) appropriated, (b) set apart by law, (c) or *authorized by law* to be contracted for or expended. In other words, the amount contracted for need not necessarily have been appropriated or set apart by law. It suffices if the amount of the contract has been *authorized by law*.

The question that naturally arises is, when is an expenditure for a local improvement *authorized by law*? Or stating it in a different form, is the expenditure unauthorized by law until the court has confirmed a special assessment equal to or in excess of the amount of the contract subsequently awarded the lowest responsible bidder?

Sections 1 and 4 of the Local Improvement Act read as follows:

"1—That the corporate authorities of cities, villages and incorporated towns are hereby vested with the power to make such local improvements as are authorized by law, by special assessment, or by special taxation of contiguous property, or by general taxation, or otherwise, as they shall by ordinance prescribe."

"4—When any such city, town or village shall by ordinance provide for the making of any local improvement, it shall by the same ordinance prescribe whether the same shall be made by special assessment or by special taxation of contiguous property or general taxation, or both. (As amended by act in force July 1, 1905, p. 101.)"

The first section of the act vests in the City Council the power to make a local improvement, which means the power to pass the ordinance. The fourth section of the act says that when the City Council has passed the ordinance it has then made provision for the making of the improvement, i. e., it has then legally authorized the making of the improvement, and no further action on its part is necessary for this

purpose. By the passage of the ordinance, the City Council sets its seal of approval upon the undertaking. The subsequent details are delegated to and imposed upon other agencies and departments of the City government. It is true proceedings must be instituted in court, and if the court declares the ordinance invalid the action of the City Council is nullified. The situation then is the same as though no ordinance had been adopted. But if the court confirms the roll for any sum—no matter how small—the ordinance is *ipso facto* confirmed and upheld, and in consequence thereof the final step necessary to determine the legality of the ordinance has been taken and the City Council has made full and complete provision for the making of the improvement in question.

Upon the confirmation of the roll by the court, therefore, there is in existence a valid ordinance authorizing the making of the improvement.

Now it is an universal rule of construction applicable to statutes, ordinances, contracts, etc. (to which there are no exceptions that occur to the writer), that when express acts are authorized or express powers are granted by statutes, ordinances, etc., all acts and powers incidental to the carrying out of the express acts or powers are implied. Applying this rule of construction to the present situation, it would seem that when the Council has by ordinance, which the court declares valid, authorized the making of an improvement, it has also impliedly authorized at one and the same time the letting of a contract, because the contract is an incident that necessarily inheres in the making of such improvement.

Mr. Haft's answer to this line of reasoning and to the conclusion that it leads to is that when the Council passes an ordinance and the court confirms the roll, the price or compensation fixed by the contract must not exceed the amount for which the roll was confirmed. This argument ignores a fundamental feature of the Local Improvement Act. When the City Council considers and adopts an ordinance for an improvement, the only information it has about costs

is contained in the engineer's estimate attached to the recommendation of the Board. In the very nature of things, an estimate does not purport to be professedly exact. It is a calculation based on opinion. It is a speculative and conjectural attempt to determine a future fact. The Council knows it may or may not prove correct. If accurate under the conditions existing at the time it was made, it may become inaccurate through a change in those conditions subsequently occurring.

The Council, by its ordinance, definitely commits itself to and authorizes the making of the improvement (which connotes the letting of the contract) but certainly the Council cannot intend to say that the cost of the improvement shall not exceed the estimate or the judgment, because it has no means of then knowing or ascertaining the amounts of the bids that will be submitted by the contractors for doing the work.

To hold otherwise would result in confusion and absurdity, as a moment's reflection will show. Section 75 of the Local Improvement Act requires the City to take steps to let the contract within ninety days from the confirmation of the roll. Section 76 directs the giving of notice that bids will be received not less than ten nor more than fifteen days after the date of advertisement. Section 77 provides that the contract shall be awarded within twenty days from the date fixed for receiving bids. Now suppose all bids are in excess of the estimate and judgment of confirmation, then, according to Mr. Haft, the contract could not be awarded, because, if the Board is without power to execute a contract under the award, it is without authority to make the award. You could re-advertise of course, but again, suppose the new bids were in excess of the estimate and judgment of confirmation, the Board would then have reasonable proof that the work could not be done for the amount named in the estimate or the judgment of the court, and it would be compelled to initiate proceedings for a supplemental assessment. But suppose, after the supplemental assessment had been confirmed

and a new advertisement for bids published, the bids made in pursuance thereof exceeded the amounts of the original and supplemental assessments, you would still be unable to award the contract.

Then suppose the Council passed a resolution charging the new deficiency to Public Benefits (you can only levy one supplemental assessment where the deficiency is caused by the engineer's estimate being insufficient) and your Board re-advertised for bids and the bids again exceeded the amounts of the original and supplemental assessments and the public benefit order. It is apparent that, if Mr. Haft's contention is correct, the Board might be compelled to travel indefinitely in an ever widening circle that would delay for years the construction of needed public improvements. That this hypothesis is not altogether strained or far-fetched, your experience with rising costs during the period of the war will show.

Suppose again that you let a contract for an improvement for an amount not in excess of the engineer's estimate or the judgment of confirmation, and during the progress of construction, engineering or other difficulties are encountered and some change in the plans or character of the improvement involving extras is necessary. Mr. Haft says in effect that you would have to stop the work and levy a supplemental assessment for the amount of the extras. It is conceivable, however, that you might be confronted with an emergency, and that if the extra work was not immediately done (and its cost incurred) serious damage might result to the portion of the work already completed entailing the loss of thousands of dollars to the City.

We do not believe that the Legislature intended to pass an act that would involve the Board of Local Improvements in such a maze of difficulties and absurdities as would necessarily result from the construction given the statute by Mr. Haft, and we do not believe the courts—if they ever have the precise situation presented to them—will so construe the statute.

There is another important factor to be borne in mind in this connection. Section 59 of the Local Improvement Act reads as follows:

“Supplemental assessments—Rebates. At any time after bids have been received pursuant to the provisions of this act, if it shall appear to the satisfaction of the Board of Local Improvements that the first assessment is insufficient to pay the contract price or the bonds or vouchers issued or to be issued in payment of such contract price, together with the amount required to pay the accruing interest thereon, said Board shall make and file an estimate of the amount of such deficiency, and thereupon a second or supplemental assessment for such estimated deficiency of the cost of the work and interest may be made in the same manner as nearly as may be as in the first assessment, and so on until sufficient money shall have been realized to pay for such improvement and such interest. It shall be no objection to such assessment that the prior assessment has been levied, adjudicated and collected unless it shall appear that in such prior cause upon proper issue made, it was specially found, in terms, that the property objected for would be benefited by said improvement no more than the amount assessed against it in such prior proceedings. If too large a sum shall at any time be raised, the excess shall be refunded ratably to those against whom the assessment was made: Provided, however, the petitioner, in case it so elects, may dismiss the petition and vacate the judgment of confirmation either at or after the term at which the judgment of confirmation is rendered, and begin new proceedings for the same or a different improvement as provided in Section 56 of this act as amended. Provided further, that if said estimated deficiency shall exceed ten per centum of the original estimate, then a public hearing shall be had on said supplemental proceeding, in like manner as in the original proceedings: And, provided, further, that no more than one (1) supplemental assessment shall be levied to meet any deficiency where said deficiency is caused by the original estimate made by the engineer, being insufficient. (As amended by act approved May 18, 1905. In force July 1, 1905. L. 1905, p. 103.)”

Here is a section of the Local Improvement Act itself which deals with the very situation we are discussing, i. e.,

with deficiencies caused by letting contracts for expenditures in excess of the amount of the estimate and of the judgment of confirmation. The Legislature does not say that such a contract is null and void nor that it is invalid. On the contrary, the validity of the contract is impliedly recognized by the provision of the machinery for raising the deficiency by a supplemental assessment. If such contracts are illegal is it reasonable to suppose the legislature would outline a method to raise funds to pay the compensation designated therein?

From a consideration of the foregoing facts, we are of the opinion that upon the confirmation of the assessment roll by the court and compliance with the requirements of the statute as to advertising for bids, etc., your Board is authorized to award and execute contracts for local improvements, even though the contract price exceeds the amount of the engineer's estimate and the judgment of confirmation.

We are also of the opinion that such a mode of procedure does not constitute an infraction of Section 208 of the Criminal Code aforesaid, for the reason that the contracts are authorized by law, and no person can ever be guilty of the commission of a crime in the doing of a legal act in a legal manner.

Yours very truly,

PHILIP J. McKENNA,

Approved: *Attorney, Board of Local Improvements.*

FRANCIS X. BUSCH,
Corporation Counsel.

City May Not Condemn Railway Property Longitudinally, But May Condemn Crossing or Bisection.

July 23, 1924.

HON. JOHN J. SLOAN, President, Board of Local Improvements.

Dear Sir:

We return the correspondence attached to Miss Kramer's letter of July 17th, wherein you request an opinion as to what

classes of railroad property the City of Chicago has power to condemn and appropriate for street purposes.

The general rule of law applicable to this subject is succinctly stated in *C. & A. R. R. Co. v. City of Pontiac*, 169 Ill. 155-162, as follows:

“Property already appropriated to public use cannot be taken for another public use, unless power to make such second appropriation is granted by the legislature, either expressly or by necessary implication.”

The power of the legislature to authorize the condemnation of every kind of real estate no matter by whom it is owned and irrespective of the uses to which it is being devoted or for which it is being held is expressly guaranteed by Section 14, Article XI of the Constitution of 1870 in the following terms:

“The exercise of the power, and the right of eminent domain, shall never be so construed or abridged as to prevent the taking, by the general assembly, of the property and franchises of incorporated companies already organized, and subjecting them to the public necessity the same as of individuals.”

It remains to be seen now, whether the legislature has conferred the plenary power of eminent domain upon municipalities of this state for the purpose of opening, widening and extending streets. By Par. 7, Section 62, Article V, Chapt. 24, Hurd's 1919 Statutes, cities are authorized:

“To lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same,”

and by Par. 89 of the same section and the same chapter:

“The City Council shall have the power, by condemnation or otherwise, to extend any street, alley or highway over or across, or to construct any sewer under or through any railroad track, right of way, or land of any railroad company (within the corporate limits); but where no compensation is made to such railroad company the city shall restore such railroad track, right

of way or land to its former state, or in a sufficient manner not to have impaired its usefulness."

Under the general powers over streets vested in the City Council by Par. 7 aforesaid, the City of Chicago has the undoubted power to cross or bisect the right of way and lands of a railroad company for the purpose of opening, widening and extending its streets and alleys. (20 Corpus Juris, pages 611-612, and cases cited; 3 Dillon on Municipal Corporations (5th Ed.), Section 1020 and cases cited; 4 McQuillin on Municipal Corporations (Ed. of 1912), Section 1500 and cases cited; *Railway Co. v. Long Branch Commissioner*, 39 N. J. Law, 28.)

But an entirely different situation arises where the City seeks to acquire an easement to lay out, open and widen a street longitudinally along the right of way of a railroad, and the authorities unequivocally hold that this cannot be done in the absence of special legislative provision conferring the authority either in express terms or by necessary implication.

In 10 Enc. of Law, p. 1096, the rule is stated as follows:

"In order to warrant the appropriation of property already devoted to railroad purposes for longitudinal or parallel lines, there must be a grant in express terms or an authority arising from a necessary implication."

In 3 Dillon on Municipal Corporations, *supra*, the author says:

"But general authority to lay out and extend the city streets will not permit the appropriation of railroad property under circumstances which are inconsistent with the continued use of the property for railroad purposes. Hence, such a general authority will not authorize a city to lay out a street *longitudinally* along the right of way of a railroad."

In 4 McQuillin on Municipal Corporations, *supra*, the author discussing this same question employs the following language (p. 3139):

“However, where there is express statutory authority or the right exists by necessary implication, a municipality may condemn railroad lands for a street, although such use will be inconsistent with the use made by the railroad company. On the same theory, where no special provision is made by statute for taking the land of a railroad company, a municipality cannot condemn for a street a strip of land on which tracks of the railroad company were laid out longitudinally.”

In 20 Corpus Juris, the doctrine is announced in the following manner:

“It is uniformly held that a general authority to lay out streets or highways authorizes the extension of a street or highway across a railroad track, provided the use of the right of way for railroad purposes will not be thereby destroyed or essentially impaired. But such general authority does not authorize condemnation of railroad property for a street or a highway to run longitudinally thereon.”

In *Railway Co. v. Long Branch Commissioners*, *supra*, the court said:

“The power of the legislature, on just compensation being made, to sanction the acquisition by one corporation of the franchises of another, may be considered as too firmly established to admit of debate. But it is equally certain that no such power will result from the mere authority to acquire by condemnation the land requisite for the enterprise. A similar immunity must be extended to the property of the corporation, in connection with which its franchises are solely capable of being exercised. Such property cannot be taken where the appropriation of it to another use will destroy or impair the exercise of the franchises of another corporation, unless the power to take is given in express terms or arises from a necessary implication.”

And on page 33 the court said:

“The distinction between the crossing of a highway or the track of a railroad, and the occupation of a road-bed, which in its nature must necessarily be exclusive, is recognized in the cases cited. Under a condemnation

of a right to cross, nothing will be acquired but a mere right of way, and the place of crossing will remain in common use of the parties for the exercise of their several franchises. The condemnation, under such circumstances, will leave the franchises unimpaired. *State, The Easton and Amboy R. R. Co., pros. v. The National R. R. Co.*, 7 Vroom, 181. A right affecting so slightly the exercise of the franchises of another corporation may be deduced from a mere grant of the power of condemnation.

“But where the use for which the condemnation is prosecuted is of such a character as necessarily to require for its enjoyment the exclusive possession and occupation of the premises, it is manifest the condemnation will be utterly futile, unless it may operate also to extinguish the right of the corporation whose title is condemned, to use the lands for its corporate purposes. A condemnation that will accomplish this result will destroy, *pro tanto*, the franchises of the corporation, and impair, to that extent, the powers granted by the legislature. Especially will that be the case where the land has been improved and applied to the designated use by making a roadway or the construction of tracks and improvements upon it. Still more obviously will the legislative intent be defeated where priority of location confers priority of right. The power to invade the privileges of a corporation in such a manner will not be inferred from a naked grant of the power to condemn. It can only be derived from a power granted either in express terms or arising by a necessary implication; and the legislative intent to authorize such an interference with the rights and privileges of another corporation—whichever way it may be manifested—must be plainly perceived.

In the present case, the strip proposed to be taken lies within the limits of lands authorized to be held by the Long Branch and Sea Shore Railroad Company for railroad purposes. Within those limits, the discretion was conferred on the company to locate its tracks and appendages where and in such a manner as it might be deemed advisable. In the exercise of that discretion, a freight track or siding was placed in this locality. The land, therefore, is land acquired and in actual use for corporate purposes. That the company may conveniently abandon this track, or transact its freight business else-

where, will not aid the defendants. The discretion to select the site on which the business shall be transacted within the prescribed limits, was delegated by the legislature to the company, and the defendants have no jurisdiction to revise the exercise of that discretion and compel the removal of the track to some place where, in their judgment, the public interests would be best promoted. If their right in this instance be sanctioned, it will be competent for local authorities, almost everywhere in the state, to determine what lands railroad companies shall hold, and what facilities they shall provide for business in the present or future."

There is in this state no legislative sanction for the appropriation longitudinally of railroad right of way property, unless it be found in Par. 89, Section 62, Chapt. 24 aforesaid, but after careful study and consideration we conclude that the word "over" employed in this section of the statute is used synonymously with "across" and that the section was enacted for the purpose of empowering municipalities to cross railroad property and not for the purpose of authorizing municipalities to condemn longitudinally lands of railroad companies used for right of way purposes.

That this is the proper and necessary construction to be placed upon Par. 89, Section 62, Chapt. 24, Hurd's 1919 Statutes, is strongly intimated by our Supreme Court in *C. B. & Q. R. R. Co. v. City of Chicago*, 149 Ill. 464, and *C. & A. R. R. Co. v. City of Pontiac*, 169 Ill. 155-165, although it should be pointed out that the precise question here discussed was not directly involved in these cases.

It is our opinion from a consideration of the law and the facts recited in the correspondence submitted us that you cannot expropriate *in invitum* for street purposes the 10 foot strip of the right of way of the Kensington & Eastern R. R. from 115th street south for some distance.

As to the vacant tract of ground at 115th street and Cottage Grove avenue, we express no opinion at this time because we have no information as to the area of vacant land owned by the railroad company at this point, nor as to the

purpose for which it was acquired or the uses to which it is being put or of which it is susceptible.

Very truly yours,

PHILIP J. McKENNA,
Attorney, Board of Local Improvements.

THOMAS A. SHEEHAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Issuance of License, Without Charge, to Vice Consul of Panama to Keep Dog.

July 23, 1924.

HON. THOMAS P. KEANE, City Collector.

Dear Sir:

On July 7, 1924, you requested an opinion from the Law Department as to what course you should pursue in the case of the application of the Vice Consul of Panama for a dog license to be issued without charge under the terms of the existing treaty between the United States and Panama.

This question of exemption of foreign representatives from the payment of personal taxes frequently arises, due to the fact that the ordinances make no provision for such cases. However, similar cases which have come up in the past have been determined by this department in accordance with the terms of the treaty in existence between the countries.

In your letter you state that the communication from the Vice Consul of Panama to the Mayor sets forth that the terms of the existing treaty between his country and ours

exempt him from payment of the license fee. Assuming that such statement is correct, we advise that the license in this instance should be issued without charge.

Under the present circumstances, the terms of the agreements between the countries should, in each instance, be the determining feature.

Yours truly,

RUTH C. NELSON,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Provisions of Ordinance Relative to Change of Air in Rooms—Re-circulation Is Not Sufficient.

July 23, 1924.

HON. HERMAN N. BUNDESEN, Commissioner of Health.

Dear Sir:

We have your communication of the 19th inst. seeking an opinion from this office with reference to Section 2153 of The Chicago Municipal Code of 1922 as to whether air in buildings designated under Paragraph "a" can be re-circulated.

We desire to say that were Paragraph (a) to stand alone the wording therein contained, viz.:

"The air in any room * * * shall be *changed*
so as to provide each person * * *"

would admit of doubt as to whether "washed" or "re-circulated" air by means of mechanical processes was not in reality changed air.

But we look further in said Section 2153, and under Paragraph (p) we find the following:

"No part of the *fresh air* supplied in compliance with the requirements of this section shall be taken from any cellar or basement."

It therefore seems that the plain and unmistakable language of this paragraph should dispel any doubt of the intent of the City Council, that only fresh air was to be used in all events, and your department should so govern itself.

Very truly yours,

JAY A. SCHILLER,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

City Has No Power to Sell Gasoline or Establish Filling Stations.

July 24, 1924.

HON. JOSEPH RUSHKEWICZ, Secretary, Committee on High Cost and High Rents.

Dear Sir:

We beg leave to acknowledge receipt of your letter of the 23d instant requesting our opinion whether there is any law or ordinance preventing the City of Chicago from establishing gasoline stations.

Please be advised that under the powers granted the City Council in the Cities and Villages Act (second clause of Article V) it is specifically stated,

"To appropriate money for corporate purposes only

* * *

and the sale of gasoline to motorists cannot be considered as a corporate purpose.

It will therefore be impossible for your Committee to give this matter any further consideration.

Very truly yours,

JAY A. SCHILLER,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Status of Submerged Lands Under Throop Canal.

July 25, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

On January 8, 1924, you addressed a letter to the Corporation Counsel, requesting an opinion upon the question of the "legal status of submerged land underneath the waters of Throop Canal, which extends north from the north side of the south branch of the Chicago River, next east of Throop street." The request was accompanied by the letter of Mr. William H. Arthur of the firm of Isham, Lincoln & Beale, attorneys for the owners of lots abutting upon this canal. It is stated in that letter that the Throop Canal was located with six others in the year 1856 upon the plat of the subdivision of the tract of land bordering upon the Chicago River, and that lots were laid out on these canals. That the Chicago South Branch Dock Company, a corporation, received a charter for the building of the proposed canals and that they were excavated and constructed. It is stated also that they were used for conveying lumber, goods and merchandise to and from the lots abutting on said canal, and that the claim is that the canal is a private slip constructed upon private property.

The writer has examined the records in the City's Map Department and in the County Recorder's Office and finds that a plat of Green's South Branch Addition to Chicago of the north half of Section 29 was recorded June 17, 1856, and that the Throop and other canals are located on this tract of land. The lots and blocks have numbers and the plat is acknowledged. As the plat was originally recorded before the Fire, custodians of the records say that they might not always be said to be exact copies. It would be impossible, therefore, to say that the dedication statute had been in all particulars complied with. If it did not so comply the dedication may have had the effect of a common law dedication.

Mr. Arthur states that the lots were sold by number, and as we have said, they are numbered on the plat.

The characterization of the canal as a "private slip" I understand as intending nothing more than that the ownership of the land is private, since it is the settled law in this state that artificial canals are public navigable waterways, and are subject to the jurisdiction of both federal and state authorities, just as all navigable waters are. It is equally well settled that the public acquired an easement of navigation in the canals constructed by this company. In several cases before the Supreme Court the character of these artificial waterways has been involved and decided.

River and Harbor Acts of 1890 and 1899.

Robert v. Parsons, 191 U. S. 17, 26.

Ligare v. Chicago, 139 Ill. 49.

Ligare v. C. M. & N. R. R. Co., 166 Ill. 249.

DuPont v. Miller, 310 Ill. 140.

The federal authority though paramount is not exclusive, and the authority of the State over waters within its jurisdiction is concurrent to be exercised not inconsistently therewith. *Cummings v. Chicago*, 188 U. S. 410.

The City of Chicago has only such authority over navigable waters as is delegated to it by the legislature in the Cities and Villages Act. Power is there given the City to construct and keep in repair canals and slips for the accommodation of commerce. The Supreme Court in the case of *DuPont v. Miller* in which the State itself had refused to relinquish the public easement in the DuPont Canal and in which the court said the State was justified in refusing because it was there shown that the DuPont Canal and others of like character would be needed in the completion of the proposed Illinois Waterway, as provided in the Waterway Act. In that case the court referred to the City's authority over the slip because it was claimed that a decree under the Burnt Records Act had destroyed the easement, and that the City having been made a party the decree against it was also a decree against the State from which the City derived

its authority. And the court cites from the case of *Ligare v. Chicago*, 139 Ill. 46, which was an attempt by the City to condemn and fill up the Ogden slip in the proposed widening, etc., of Archer avenue, as follows:

“Power is given the City by the 31st clause of Section 1, Article 5, Chapter 24 ‘to construct and keep in repair canals and slips for the accommodation of commerce’ but we have found no power granted to the City to close them and fill them up.”

Our understanding of any authority the City might have to permit the filling of a slip or canal and the erection of other obstructions in it could only be exercised after the State’s release of the public easement in the waterway.

Pending the prior appeal the railroad company had taken possession and the street was widened, but the Ogden slip by order of the court was left unfilled. The railroad company then filed its petition and the Supreme Court on the appeal in those proceedings reversed itself, on further evidence as to the condition of the slip or canal, and there said:

“As to waters of this character, navigable capacity is a question of fact, and the burden of proof is on him who alleges it.”

Ligare v. C. M. & N. R. R. Co., 166 Ill. 249.

It would seem then that the status of each canal depends upon the facts of its own physical condition and the surrounding circumstances. Undoubtedly if facts exist which would show that the public would sustain loss by the relinquishment of the easement, the State itself could not authorize a release, for this would be an attempted inconsistent exercise of its authority with that of the federal authority. *Cummings v. Chicago*, 188 U. S., *supra*. The interest of the federal government is not limited to waters that were, at the date of the act of Congress, or as are now actually open to use, and the fact that a waterway is not a present aid to navigation does not preclude the power of Congress to retain it for future use. The doctrine was applied to the Desplaines River which had been out of use for 100 years, and it was

sought to erect a dam therein at a point in Grundy County, Illinois.

Ownership of the Submerged Land.

“The rule of the common law is that where a riparian proprietor owns the land on both sides of the river he is the owner of the whole of the bed of the stream to the extent of his lands upon it.”

This rule has been adopted in this state, and applied by the Supreme Court to the Mississippi, Rock, Chicago, Calumet and Desplaines rivers.

The People v. Economy Power Co., 241 Ill. 290.

Chicago v. Laflin, 49 Ill. 172.

Washington Ice Co. v. Shortall, 101 Ill. 52.

Chicago v. Van Ingen, 152 Ill. 624.

Beidler v. Sanitary District, 211 Ill. 628.

Yates v. Milwaukee, 77 W. I. 497.

There is no case reported in which the ownership of the bed of such canal constructed in private land was directly in issue, but the doctrine of riparian rights is applied to the lots upon these waterways.

The Throop Canal is one of the canals upon which owners of lots brought suit against the Sanitary District for damages for lowering the level of the waters in the canals and in that case the Supreme Court applied the doctrine of riparian rights to these lots, and it was there said that the title extended to the middle of the canal. The case is *Beidler v. Sanitary District*, 211 Ill. 628.

From the opinion:

“Appellants are the owners of sixty-six lots, all of which they claim were damaged by the act of the Sanitary District of Chicago in lowering the general level of the water in the south branch of the Chicago River. Seven of these lots front or abut on this branch of the river. The others front on canals, leading from the south branch at right angles to the general course of the stream. It is contended by appellee that appellants have no riparian rights appurtenant to those lots which do not abut on the river, and this presents the first question for our determination.

At the time the canals were excavated, the real estate through which they extend was all property of one owner. More than twenty years intervened the construction of the canals and the opening of the principal channel of the sanitary district, the opening of which reduced the level of the water. After the canals were opened the owner of the land subdivided the same into lots facing or abutting upon the canals, except a few immediately contiguous to and fronting upon the river. These lots the owners sold from time to time without any reservation.

Under the law of this State, the owner of lots on each side of a river, such as the Chicago river, is also the owner of the bed of the stream to the center of the stream (*McCartney v. Chicago & Evanston Co.*, 112 Ill. 611); subject only to the right of the public to the free and undisturbed navigation of the river. (*Chicago & Pacific Railroad Co. v. Stein*, 75 Ill. 41.) * * *

It is suggested by the appellee that these cases all involve the relative rights of private parties and that no such right can be acquired by prescription against the public. The right of the public in this stream is the right to navigate it. No right can be acquired by prescription which will interfere with this right of navigation. It does not appear from the declaration in this case, that filling these canals with water from the river interfered in anywise with navigation. In view of the length of the canals and the amount of water necessarily required to fill them to the level of the river, the diversion of the waters to the canals was an appropriation of the water adverse to the rights of other owners of abutting property, and as the appropriation did not violate the public right of navigation, the owner of each lot fronting upon either of these canals acquired, by prescription, the same riparian rights in the waters therein that he would have had if the canals had been natural waterways, and, under the authorities above cited, his title extended to the middle of the canal."

The interest of the public acquired by the dedication of these waterways is stated above and is also stated in *Du Pont v. Miller*, *supra*, as follows:

"The rule in this State is that the public have an easement for purpose of navigation in waters which are

navigable in fact, regardless of the ownership of the soil. Whether such waters are navigable depends upon whether they are of sufficient depth to afford a channel for use for commerce. *Schulte v. Warren*, 218 Ill. 108."

Our conclusions in the matter are:

First, that no action of the City toward the obstruction of the canal can legally precede a relinquishment of the public right of easement of navigation by the State, and, perhaps, also the Federal authorities; and,

Second, that the ports of our State would hold that the land interests of abutting owners include the bed of the canal, in view of the statement made in the decisions of the nature of the public's interest and the statement of the extent of the title made by the court in the *Beidler* case, which has never been criticized.

It may be, however, that an authentic complete record of title might disclose a state of facts which would add to the City's rights, and which the records available to us do not indicate.

The City cannot release the public right of navigation; what it might legally do after that may have been done by the proper authorities would we believe be in the nature of a regulatory measure upon private property.

We are of the opinion that the permission of the City to close this canal asked at this time is premature and should not now be granted.

Respectfully submitted,

CORA B. HIRTZEL,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Inclusion of "Near-Beer" Manufacturers Within
Terms of Ordinance Licensing Soft Drink
Manufacturers.**

July 25, 1924.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

You have requested this office for an opinion relative to the question of whether a company engaged in the manufacture of "near-beer" is entitled to a license under the ordinance regulating soft drink manufacturers and dealers, said ordinance being known as Article XVII of Chapter XXXIX of The Chicago Municipal Code of 1922, comprising Sections 1986 to 1996 of said Code. In connection with this inquiry, you state that the Pfeifer Products Co., Inc., 732-42 North Leavitt street, Chicago, Illinois, has made application to your department for a soft drink manufacturers' license. You also state that the said company manufactures "near-beer" under a permit issued by the United States Treasury Department, of date February 23, 1924.

For the following reasons we are of the opinion that the soft drink manufacturers' and dealers' ordinance contemplates the licensing of a company manufacturing "near-beer." Section 1986 of the Code defines a soft drink manufacturer as follows:

"1986. Soft drink manufacturer defined—license required.) It shall be unlawful for any person, firm or corporation to engage in the manufacture, making, compounding, bottling, or in the distribution or delivery, of waters, carbonated waters, aerated or still beverages within the city without first having obtained a license as hereinafter provided.

For the purposes of this article such persons, firms or corporations so manufacturing, making, mixing, compounding or bottling, or so distributing or delivering wa-

ters or beverages shall be known as soft drink manufacturers and dealers."

We are of the opinion that the terms "waters, carbonated waters, aerated or still beverages" are generic and include "near-beer." However, all doubts are dispelled by the following portion of Section 1988 of said Code, which clearly shows an intent to include "cereal" beverages. Said portion of Section 1988 is as follows:

"Class I. Manufacturer or wholesaler. The annual license fee to be paid for this class shall be as follows:

Where *cereal or both cereal and carbonated beverages* are manufactured or distributed, one hundred dollars and twenty-five dollars additional for each vehicle operated under said license by said manufacturer or wholesaler over and above two vehicles, which first two vehicles are hereby exempted from said vehicle license provision; provided, however, that the additional fee to be paid for each vehicle operated and used principally for the delivery of non-carbonated drinking water shall be fifteen dollars."

The foregoing clearly shows that "cereal" beverages are included by the soft drink manufacturers' and dealers' ordinance. The words "cereal beverages" mean any drink manufactured from grain. Near-beer is such a drink.

You have stated in your communication, that the inspection which you are required to make under Section 1993 shows that the premises in question are in a sanitary condition and comply with the requirements of said section. We therefore see no reason why you should not recommend that this license be issued.

Very respectfully,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Right of Public Access to Records of Vital Statistics—
What are Public Records?—Right of Access by
Statute—Common Law Right—What
Constitutes Special Interest?**

July 26, 1924.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

You have requested the Corporation Counsel for an opinion relative to what persons, if any, are entitled to access to the records of vital statistics preserved by the Health Department, and you have submitted a number of questions to which you desire answers.

A public record is any book or document which a public officer is required by law to keep.

Robinson v. Fishback, 175 Ind. 132; 93 N. E. 666.

Clement v. Graham, 78 Vt. 290.

A record of vital statistics is a record which the Health Commissioner of the City of Chicago is required to keep by Sections 1806-1809 of The Chicago Municipal Code of 1922, and Section 1772 of said Code provides for the appointment of a Registrar of Vital Statistics by the Commissioner of Health. Section 4 of "An Act to provide for the registration of all births, still births and deaths in the State of Illinois, etc.," approved June 22, 1915, in force July 1, 1915, provides, in part, that a city may by local ordinance appoint an officer of the City who shall act as Local Registrar of the registration of births and deaths, and who shall report the same to the State Board of Health, subject to its rules and regulations. Section 12 of said act provides that these reports shall be filed upon certificates, the form of which is to be prescribed by the State Board of Health. Therefore, there is no question but that the records kept by you as Local Registrar are public records.

The question then is, what rights of access have the public generally to public records. Many statutes requiring records and other documents to be kept by public officers, specifically provide that the public shall have the right of access to such documents. Thus, in "An act to revise the law in relation to County Clerks," approved March 24, 1874, in force July 1, 1874, it is provided, in Section 9 of said act, that all the records, books and papers pertaining to the office of the County Clerk shall be open to the inspection of all persons without reward. By Section 97 of "An act for the assessment of property and for the levying and collection of taxes," approved March 30, 1872, in force July 1, 1872, it is provided that the assessment books shall remain open to the inspection of all persons. By Section 26 of "An act to create sanitary districts in certain localities," approved May 17, 1907, in force July 1, 1907, it is specifically provided that all books and papers pertinent to the officers of the Sanitary District shall be open to the inspection of any taxpayer or any other person interested. It is also provided by statute that the books and papers of the City Collector of the City of Chicago shall be open to the inspection of the Mayor, City Clerk or any member of the City Council. (Section 16 of Article VII, of the Cities and Villages Act of 1872.)

Not all statutes, however, provide for inspection by the public of public records required to be kept by the respective statutes, and in the absence of such an expressed provision, our Supreme Court has defined the common law rule of access to records to obtain, viz., that only persons having a special interest in the records may inspect the same.

Scribner v. Chase, 27 Ill. App., at 39.

Chicago Title & Trust Co. v. Danforth, 137 Ill. App. 338, at 357. (Aff'd 236 Ill., at 562.)

An examination of the provisions of the statute relative to the registration of births and deaths provides, "The State Board of Health, any Local Registrar or any County Clerk, shall, on request, furnish a certified copy of the record of

any birth, still birth, or death, to any applicant entitled to the same, upon the payment by such applicant of a fee of fifty cents (\$0.50) to the maker of such certified copy * * *"

This is the only provision in the statute which bears upon the right of access to the records and it does not give the public a general, unlimited right of access, but merely prescribes that certified copies of the records may be given to any person "entitled to the same" upon the payment of fifty cents. The statute does not define what is meant by the words, "entitled to the same." In the absence of such a definition it is logical to fall back upon the common law definition, and interpret the statute to mean that any person having a special interest in the subject-matter is entitled to a certified copy upon the payment of fifty cents, and is also entitled to inspect that portion of the records in which he has a special interest.

Although the decisions are not harmonious with regard to what persons have a special interest and are thereby entitled to examine a public record, it is clear that any relative of the individual concerning whom the record contains information, is beyond doubt entitled to an inspection of the same, or, upon the payment of fifty cents, to a certified copy of the same. We are also of the opinion that an insurance company which is not merely conducting a general fishing expedition to obtain information for the purpose of soliciting business, but which has a special interest to secure information concerning some person whom they have already insured, is entitled to inspect the records. The police department, the state's attorney's office, administrative branches of the Federal Government, and other public officers are entitled to examine the records or receive a certified copy of any certificate, providing their purpose is to secure information in the line of their official duty. On the other hand, a person who desires to inspect the records merely for the purpose of curiosity or to satisfy a whim or caprice, is not entitled either to access to the records or to a certified copy of any record. There are also decisions to the effect that persons who are

motivated only by a desire to solicit business, have no special interest which entitles them to an inspection of the records.

Randolph v. State, 82 Ala. 527.

Webber v. Townley, 43 Mich. 534.

You have called to our attention the fact that some of the information in these records is of a personal nature. It is true that the records would disclose certain personal information, such as the cause of death of persons, which might include insanity, and the legitimacy or illegitimacy of a child. However, we are of the opinion that the fact that the illegitimacy of a child may be disclosed is not a matter which calls for secrecy because Section 13 of the said statute provides that, "The certificate of birth and record thereof required by this act shall not, in the case of an illegitimate child, contain the name or other identifying fact relative to the father, or reputed father, or to the mother thereof, without the consent of said father, or reputed father, for the use of his name, nor the use of the name of the mother without her consent to the use of her name." It is also true that the provisions of Section 18 of said act are that the Local Registrars shall deposit with the County Clerk of their respective counties, a complete set of the records of births, still births and deaths, registered with them during the preceding month, and it is provided in Section 8 of "An act to create and establish a Board of Health in the State of Illinois," approved May 28, 1877, in force July 1, 1877, that the County Clerk shall be required to keep books for births, marriages and deaths, and that said books shall always be open to inspection without fee. Presumably, the same information would be disclosed by the books of the County Clerk as by the records of the Local Registrar, inasmuch as the County Clerk obtains his information from the Local Registrar, and the legislature has clearly expressed its intention that such records, when in the custody of the County Clerk, shall be open to the public. Therefore it is obvious that there is no intention on the part of the legislature to make this information privileged.

In the case of *Neville v. Board of Health of the City of New York*, 21 N. Y. S. 574, an inspection of the records of vital statistics, kept by the Department of Health, was allowed.

We find upon investigation that an opinion was rendered by the office of the Corporation Counsel on September 16, 1922, concerning the right of the Commissioner of Health to keep confidential all information received by him under that section of the said Code requiring reports of venereal diseases to be sent him. However, this opinion in no way conflicts with the former opinion, because it is specifically provided in the ordinance that those communications are to be kept confidential, and there is no such provision in the ordinance or statute regarding the Local Registrar of Vital Statistics.

It is desired to call to your attention the fact that the local registrar has the power to make reasonable regulations concerning the inspection of the records by the public. For example, the registrar may appoint reasonable hours when the records shall be open to the public and make reasonable regulations concerning the giving out of information.

Brewer v. Watson, 71 Ala. 299.

Upton v. Catlin, 17 Colo. 546; 17 L. R. A. 282.

State v. Rochac, 37 Minn. 372.

It has even been held that a reasonable fee may be required for the inspection of the records by the public in order to provide for the additional expense of creating facilities for the public to inspect the same.

Burton v. Reynolds, 102 Mich. 55.

It should be borne in mind that all of the records are subject to subpoena and that any person may subpoena them into court for the purpose of using them as evidence in any pending lawsuit.

Very respectfully,

ALBERT H. VEEDER,

Approved: Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Cancellation of Warrants, Including Special Assessment Rebate Warrants, Which Are Uncalled for After Two Years.

July 31, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We have your letter of July 23d in which you ask us to construe an ordinance passed by the City Council on July 11, 1924, appearing on page 3310 of the Council Journal for that date. Said ordinance amends The Chicago Municipal Code of 1922 by inserting therein section 47a, which reads as follows:

"47a. Uncalled for and Unpaid Warrants More Than Two Years Old.) Whenever a warrant drawn upon the treasurer remains in the hands of the comptroller uncalled for during a period of two years after its issuance, the comptroller may cancel such warrant, and thereupon the fund against which the said warrant is drawn shall be credited for the amount of same. If any warrant more than two years old which has been delivered by the comptroller to the payee shall remain outstanding and unpaid, the comptroller shall credit the fund against which such warrant is drawn with the amount thereof and shall notify the treasurer, and the treasurer shall thereupon withhold payment on such warrant if presented for payment. If such old warrant is presented for payment after such notice is received by the treasurer, the person holding the same and rightfully entitled thereto shall receive a new warrant in the same amount upon the surrender of the old warrant to the comptroller, such new warrant to be drawn by the comptroller against such fund as the city council may appropriate for that purpose, which shall entitle him to immediate payment from the city treasury. The city council shall annually make such appropriation for the redemption of such cancelled uncalled for and unpaid warrants as may be necessary to secure the prompt payment of all such warrants as may be demanded or pre-

sented for payment, as the case may be, by the rightful owners thereof."

Your letter states that the City Treasurer interprets said ordinance to cover all warrants issued by the City Comptroller, including special assessment rebate warrants, and declines to honor any warrants which are more than two years old when presented for payment, and that such declination is causing a great deal of inconvenience especially in respect to the payment of special assessment rebate warrants. Your letter states that you are of the opinion that the State laws forbid the cancellation of special assessment rebate warrants if outstanding for a lesser period than eight years, and then asks for a legal opinion whether under said ordinance it is obligatory upon or optional with the City Comptroller to cancel warrants that are more than two years old.

The State law you refer to is, we think, an act approved May 26, 1917, and in force July 1, 1917, entitled, "An Act in relation to undistributed or unclaimed money received from the making of any local improvement paid for wholly or in part by special assessment or special taxation." Section 1 of that Act declaring the purpose for which it is passed reads as follows (Cahill's Revised Statutes, 1923, Paragraph 1006):

"That any city, town or village of this State having any undistributed or unclaimed money received from the making of any local improvement paid for wholly or in part by special assessment or special taxation, *and which money shall have remained in the possession of said city, town or village for a period of eight years or more undistributed or unclaimed as a rebate or refund*, after the provisions of the Local Improvement Act have been complied with in regard to refunds or rebates, may set aside and transfer said money, so undistributed or unclaimed, into a special fund to be known as the 'unclaimed rebate fund,' which may be used as hereinafter provided."

Section 2 of the Statute outlines the procedure to be followed in order to create such "unclaimed rebate fund" and to foreclose any and all rights to such moneys on the

part of those theretofore entitled to special assessment rebates. Section 3 provides for the passage of an ordinance, after compliance with the provisions of Section 2 relative to notice, for the creation of said "unclaimed rebate fund." Section 4 then provides for barring and forfeiting the rights of all persons theretofore entitled to rebates to any portion of the moneys transferred to such "unclaimed rebate fund." Said Section 4 reads as follows (Cahill's Revised Statutes, 1923, Paragraph 1009):

"Unless a claim is made by the person entitled thereto before the passage of an ordinance by said city, town or village, as specified in section two (2) of this Act *all interest therein and all right and title thereto of any and all claimants shall be forfeited and barred; and no action shall be begun or claim made for any money undistributed or unclaimed as a rebate or refund,* received from the making of any local improvement, paid for wholly or in part by special assessment or special taxation, after said money shall have remained in the possession of said city, town or village, undisturbed (undistributed) or unclaimed as a rebate or refund, for a period of eight years or more, and where such money has been set aside and transferred into a special fund known as the 'unclaimed rebate fund' in the manner hereinbefore provided."

The purpose of said statute is to thereafter bar all claims for the payment of rebates from funds raised by special assessment or special taxation, provided said claims have remained dormant for more than eight years, and provided further that the City has complied with the procedure prescribed by Section 2 of the Act aforesaid for the foreclosure of such claims. It is, in other words, a statute of limitations for the barring of such claims conditioned upon the City's taking the steps that are prescribed therein. The undistributed moneys to which such claims are barred, thereafter belong to the City and may be appropriated to certain other purposes set forth in Sections 5 and 6 of said Act.

The ordinance of June 11, 1924, does not attempt to bar the right of any creditor of the City to be paid. Its sole purpose is to prevent fraudulent manipulation and to

make the funds of the City more readily available for corporate uses by authorizing the City Comptroller to cancel such warrants as have become stale through remaining in his hands uncalled for, or remaining unpaid in the hands of the payee thereof until more than two years have elapsed from the dates of such warrants. Full protection is granted to the creditors of the City, in respect to the payment of their just claims, by provisions authorizing the issuance of new warrants to replace those which have been cancelled, in the event the true owners of such claims shall make demand for payment, or present for payment outstanding warrants that have been cancelled. We are, therefore, of the opinion that the State statute and the ordinance relate to different matters, are intended to produce different results, and are not in conflict.

We are also of the opinion that the Council intended, by such ordinance, to grant to the City Comptroller authority to be used in his discretion rather than to impose a duty or obligation. The ordinance provides that "whenever a warrant drawn upon the treasurer remains in the hands of the comptroller uncalled for during a period of two years after its issuance the comptroller *may* cancel such warrant." The term "may" when used in an ordinance or statute is ordinarily permissive and not compulsory. It is true that in many instances the courts have interpreted the word "may" to impose an obligatory duty, but in such instances the context clearly implied a duty to be performed in the public interest, or such ordinance or statute created rights in individuals, compliance with which might be demanded. In *Canal Commissioners v. Sanitary District of Chicago*, 184 Ill. 597, the Supreme Court of this State stated the rule as follows (p. 604):

"Where the rights of the public or of third persons are involved, words in a statute importing permission or authority may be read as mandatory, and words imposing a command may be read as permissive, whenever, in either case such a construction is rendered necessary by the evident intention of the legislature. The

words 'may' and 'shall,' when used in a statute, will sometimes be read interchangeably, as will best express the legislative intent. The word 'may' will be construed to mean 'shall' when the *public or third persons have a claim that the power ought to be exercised*; but when the word 'shall' is used, where no right or benefit to any one depends on its imperative use that word may be held directory, merely, and by legislative intention to be used synonymously with the word 'may.' "

We have been unable to find in said ordinance of June 11, 1924, any necessity for construing the word "may" as a command within the meaning of the rule just stated. The whole purpose of the ordinance, we think, is served by creating a discretionary authority in the Comptroller to cancel such uncalled for warrants more than two years old, as he shall from time to time deem necessary, to the availability of the city's funds. It is true that the ordinance in respect to the cancellation of warrants more than two years old which have been delivered to the payee thereof, but are outstanding and unpaid, stated that "the comptroller shall credit the fund against which said warrant is drawn with the amount thereof, and shall notify the treasurer, and the treasurer shall thereupon withhold payment upon such warrant if presented for payment." We think that in the language just quoted the word "shall," not being used to create a duty for the benefit of third persons or for the necessary protection of the public as a whole, is rather to be construed as directory within the meaning of the rule laid down by the Supreme Court of this State.

The ordinance does not impose upon the City Treasurer the duty of withholding payment merely because a warrant presented for payment is more than two years old. Instead the ordinance provides that the Comptroller shall notify the Treasurer of the cancellation of any outstanding warrants and "the treasurer *shall thereupon withhold payment* upon such warrant if presented for payment." The ordinance then provides "that if such old warrant is presented for payment *after such notice is received by the treasurer*, the

person holding the same and rightfully entitled thereto shall receive a new warrant in the same amount upon surrender of the old warrant to the comptroller." We are therefore of the opinion that the City Treasurer is only entitled under this ordinance to withhold payment on such warrants, being more than two years old, in respect to which he has been notified by the City Comptroller to withhold payment.

Very truly yours,

C. M. DOTY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Procedure to Make Fulton Street a Boulevard.

July 31, 1924.

HON. FRANK J. TOMCZAK, Alderman 39th Ward.

Dear Sir:

Replying to your inquiry of July 28, 1924, *in re* boulevarding Fulton street from Central Park avenue to Sacramento boulevard and the City Council's jurisdiction in the matter we find that Section 210, chapter 105 of the Illinois Statutes confers that power on the Park Board conditioned on the consent of the City Council and the consent in writing of the owners of the majority of the frontage of the lots abutting.

Said Section 210 reads:

"210. Streets taken by park commissioners, etc.
Be it enacted by the People of the State of Illinois, rep-

resented in the General Assembly: That every board of park commissioners or park authorities shall have power to connect any public park, boulevard or drive-way under its control with any part of any incorporated city, town or village (?) by selecting and taking any connecting street or streets, or parts thereof, leading to such park, boulevard or drive-way, and shall also have power to accept and add to any parks or park under their control any street or parts thereof which adjoins or runs parallel with any boundary line of the same: *Provided*, that the streets so selected and taken, so far as taken, shall lie within the district or territory, the property of which shall be taxable for the maintenance of such parks, boulevard or drive-way; *And, provided further*, that the consent of the corporate authorities having control of any such street or streets, so far as selected and taken, and also the consent in writing of the owners of a majority of the frontage of the lots and lands abutting on such streets, so far as taken, shall be first obtained."

Respectfully submitted,

EDMOND L. MULCAHY,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Facts and Law Pertaining to the Maintenance and
Operation of a Long Distance Telephone System
in the Streets of the City of Chicago, by the
American Telephone and Telegraph Com-
pany and the Chicago Telephone
Company, Without Franchise,
License or Permit.**

Chicago, August 1, 1924.

HON. FRANCIS X. BUSCH, Corporation Counsel.

Dear Sir:

Pursuant to your recent official direction to me to "go fully into the facts and law" relative to the operations of the American Telephone and Telegraph Company in the City of Chicago without franchise, license or permit, I beg leave to submit the following report and opinion:

F A C T S .

The American Telephone and Telegraph Company, a New York corporation, began operation here under franchise ordinances passed in 1889 by the Village of Jefferson and the Town of Lake, authorizing the corporation to construct, maintain and operate telegraph and telephone lines in these municipalities. With reference to these ordinances and the American Telephone and Telegraph Company's operations in the City of Chicago, the following notation appears in "Special Ordinances of Chicago," Hoover, 1915:

"American Telegraph and Telephone Company.

"This company operated in the Village of Jefferson under an ordinance passed January 9, 1889, and in the Town of Lake under an ordinance passed February 12, 1889, accepted March 5, 1889, bond filed February 26, 1889. These ordinances contained no limitation of

the term of the grants and are not now being operated under as all the property of the American Telegraph and Telephone Company within the present limits of the city has been acquired by the Chicago Telephone Company."

Soon after the passage of these ordinances granting franchises to the American Telephone and Telegraph Company, to-wit: on June 29, 1889, the towns of Jefferson and Lake, by election, were annexed to the City of Chicago. The American Telephone and Telegraph Company, however, continued to maintain and operate its plant in the annexed territory, and, without seeking the city's consent, actually extended its plant and operations into the original city. The fact is that the Company, ever since the granting of the franchises by the annexed municipalities, has, as a public utility, been conducting its telephone business in the City of Chicago, either by means of its own plant, lines, equipment and system which it has itself constructed in the City, or by means of the joint operation of its lines and plant with those of the Chicago Telephone Company through purported sales of physical property, contracts of employment, and other arrangements, agreements and understandings between the companies. No local authority ever was vested in the American Telephone and Telegraph Company except by the said franchise ordinances of the suburban towns of Jefferson and Lake. At no time during the thirty-four years of the company's operations, in any status which the company assumed during that period, has it applied for or received from the City of Chicago, any franchise, license, permit, right or concession to conduct its telephone or telegraph business in the city.

In the year 1911, when the American Telephone and Telegraph Company's right to operate in Chicago was first seriously questioned, the company opened negotiations with the Chicago Telephone Company, obviously for the purpose, as stated in their correspondence, "of meeting the question recently raised by the City as to the right of the A. T. & T. Company to operate in the City of Chicago." The Chicago

Telephone Company was operating under the ordinance passed by the City Council, November 6, 1907.

Two official communications which passed between the companies at the time of these negotiations are on file in this department. These are so replete with statements of what purport to be facts relative to the status and association of the companies, the ownership, control and operation of their plants, the ostensible transfer of physical property, and the working agreement arrived at by the companies, that we prefer to let these communications speak for themselves. They are as follows:

“Subject: Long Line Plant in the City of Chicago.
American Telephone and Telegraph Company (Mr)
February 14, 1911.

Chicago Telephone Company,
B. E. Sunny, Esq., President,
203 Washington Street,
Chicago, Illinois.

Dear Sir:

This letter is written for the purpose of confirming the arrangements made at the recent conference in New York for the settlement of outstanding differences between this Company and your Company in regard to the plant in Chicago used for long line purposes.

Should you find the following statement to be in accord with your understanding of the arrangements concluded, will you kindly so advise me, and we will consider this letter and your reply as a sufficient record of these arrangements.

It was recognized by the representatives of both Companies at the conference in question that a definite understanding between the two Companies concerning the plant which has been built in Chicago at various times during the past twenty years or more to afford to the patrons of the Chicago Company service over the long line plant of the American Company should be concluded without further delay. The following is a statement of the conclusions reached:

At the time that the first lines which form a part of this plant were constructed, the Chicago Company was not in a position to make the necessary investment to supply the facilities which the American Company

demanding and had a right to demand under the license contracts. Accordingly, the lines were paid for by the American Company. Since that time portions of the present long line plant in the city have been built by the American Company, portions by the Chicago Company, for which it has been reimbursed by the American Company, and other portions by the Chicago Company at its own expense, for which no settlement has been made. The result is that there is an open account between the two Companies which requires an adjustment.

It is thought that the interests of all concerned will be best served by an arrangement which leaves in the Chicago Telephone Company the ownership of all of the plant, consisting of poles, wires, conduits, cables and fixtures used in the long line business within the present city limits, and as the Chicago Company is now willing to make the necessary investment to accomplish this purpose, it is agreed that all of this plant located upon, along or under the streets of the City of Chicago shall be turned over to the Chicago Company and an adjustment made. Accordingly, the Chicago Company will purchase from the American Company all of this plant, as per Schedule "A" hereto attached, which has been built by or at the expense of the American Company, for the sum of \$229,362.20, which has been determined to be a fair valuation as of January 1, 1911, and described in Schedule "A" hereto attached. Under existing contract, the Chicago Company will be entitled to a reasonable and suitable division of the tolls and profits derived from business passing over its plant to or from points on the system of the American Company. In view of the fact that it is impossible to accurately determine this division on a mileage basis, and of the expense of accounting and other difficulties involved in such a division, it is agreed that the following arrangement shall be adopted in lieu thereof:

The entire plant owned by the Chicago Company and devoted to and used in connection with the long line business after payment of a sum of \$229,362.20, will be \$444,473.45, which has been determined to be a fair valuation of the plant as of January 1, 1911, and as described in Schedule "B" hereto attached. Additions to the existing plant will be made from time to time by the Chicago Telephone Company as required for a proper development of the business, and the cost added to the plant investment.

The American Company will pay the Chicago Company monthly for the use of this plant. Beginning January 1, 1911, this payment shall be \$6,852.29 per month, which is at the rate of 18.5% per annum on the above stated sum of \$444,473.45. Whenever important changes (either additions or deductions) occur in the long line plant in the city, the monthly sum to be paid by the American Company shall be, at the request of either party, recalculated on a basis similar to that by which the above 18.5% is computed, which basis is briefly as follows:

The depreciation percentages currently used as standard (straight line basis) by the Engineering Department of the American Company on different classes of plant, plus the percentages of repair costs to different classes of plant, as ascertained from Chicago experience, plus the average rate of taxes on plant in Chicago, plus 1% for administration expense, plus 10% for a fair return on the investment.

The depreciation percentages are understood to cover reconstruction of the plant that becomes necessary for any cause, but as reconstruction occurs the investment shall be decreased by the cost of old plant displaced and increased by the cost of new plant that takes its place.

All of the plant in question is to be maintained in good and satisfactory condition and repair by the Chicago Company, and the expenses incident to such maintenance, including taxes, general expenses or other usual current charges, are to be borne by that Company.

It is understood that this arrangement applies to and affects only the main line plant used for long line purposes, and located upon, along and under the streets of the City of Chicago; to be operated in accordance with the terms of existing agreements between our respective Companies, the same to remain in full force except as expressly modified by the arrangement outlined above.

Very truly yours,

H. B. THAYER,

Vice President.

Enclosure —B83703—”

"CHICAGO TELEPHONE COMPANY,

Office of the President.

Chicago, September 19, 1913.

N. C. Kingsbury, Esq., Vice President,
American Telephone and Telegraph Company,
15 Day Street, New York.

Dear Sir:

Referring to the proposed readjustment of the relations between your Company and the Chicago Telephone Company in connection with the long distance telephone business handled in Chicago, for the purpose of simplifying the operating and accounting routines, and for the purpose also of meeting the question recently raised by the city as to the right of the A. T. & T. Company to operate in the City of Chicago, we submit the following proposition:

The Chicago Company for a long period has been receiving as its proportion of the revenue of the long distance traffic in Chicago a specific rate per message, and in addition compensation for plant, lunches, lockers, toilet facilities and supplies to your employes; battery current and the maintenance of batteries; electric light; and space in its buildings, which items, summarized for a six months' period, March to August, 1913, inclusive, are as follows:

335,597 messages at 17c each.....	\$ 57,051.49
For use of plant	46,775.89
Lunches, lockers, and toilet supplies.....	4,209.15
Battery current and maintenance of batteries	1,295.47
Electric light and rent for space occupied..	8,487.77
Miscellaneous items	189.71

Total	\$118,009.48
Average per month	\$ 19,668.25

We have recently purchased from you the long distance switchboards located in the toll building on Franklin street, near Washington, and the Morrell Park Test and Operating Station, and the contents thereof, at a price to be determine by appraisal.

We will take over into our employment, as of September 1, 1913, all of the employes now in the service of the A. T. & T. Company necessary to conduct the long distance traffic in Chicago, and the amount of their com-

pensation shall be charged for in addition to the amount referred to above, plus ten per cent (10%).

Whatever other items of expense the Chicago Company is put to, to carry out this plan, shall also be added to the above, with ten per cent (10%).

When the value of the switchboards in the toll building and the Morrell Park Station has been ascertained and paid, the Chicago Company shall be entitled to an amount which will represent a reasonable return on the investment and the cost of maintaining the property; and it shall also be entitled to a proper return on the investment and cost of maintenance of any additional switchboard or facilities supplied on account of the long distance traffic.

The long distance traffic shall be conducted in accordance with standard rules.

This arrangement shall be effective as of September 1, 1913.

Yours very truly,

CHICAGO TELEPHONE COMPANY,
By B. E. SUNNY,
President.

Accepted:

AMERICAN TELEPHONE AND TELEGRAPH
COMPANY,

By N. C. KINGSBURY,
Vice President."

These letters, exchanged by the high officials of the companies, conclusively establish the contention, made at the time, that the American Telephone and Telegraph Company had constructed and was maintaining and operating a long distance telephone system in the streets, alleys and public places of the City of Chicago without any grant of right, license or permit. These letters, which, as proposed by the American Telephone and Telegraph Company, were to be considered by the companies "as a sufficient record of these arrangements," obviously were intended to create a real or apparent situation by which the Chicago Telephone Company, under its ordinance franchise, should thereafter own and operate that part of the American Telephone and Tele-

graph Company's long distance plant located in Chicago, which concededly could not longer be owned and operated by the American Company without franchise or license granted by the City Council. To this end it is suggested by the American Telephone and Telegraph Company "that the interests of all concerned will be best served by an arrangement which leaves the Chicago Telephone Company the ownership of all of the plant, consisting of poles, wires, conduits, cables and fixtures used in the long line business within the present city limits, and (therefore) * * * it is agreed that all this plant located upon, along or under the streets of the City of Chicago shall be turned over to the Chicago Company and an adjustment made." It is accordingly stipulated that the Chicago Company shall purchase the plant.

But, while agreement is thus made for the sale and transfer of the "ownership" of the American Telephone and Telegraph Company's "*plant located upon, along or under the streets of the City of Chicago,*" careful provision is at the same time made to assure the Chicago Telephone Company a reasonable return on its investment "*from business passing over its plant to or from points on the system of the American Company*"; practical control and exclusive use of the plant for the American Telephone and Telegraph Company's business is retained, and a monthly rental is stipulated to be paid to the Chicago Telephone Company for this "*plant.*"

The concluding paragraph of the American Telephone and Telegraph Company's letter of proposal is important as the statement of an ultimate fact. The paragraph follows:

"It is understood that this arrangement applies to and affects only the main line plant used for long line purposes and located upon, along and under the streets of the City of Chicago; *to be operated in accordance with the terms of existing agreements between our respective Companies, the same (existing agreements) to remain in full force except as expressly modified by the arrangement outlined above.*"

It is submitted as a matter of fact that, under the foregoing arrangement, or joint operation of the two companies,

the American Telephone and Telegraph Company continued to conduct its telephone and telegraph business in the City of Chicago as before, except in the apparent change of its character from that of legal owner of that part of its long distance plant located in the streets of Chicago to that of lessee or equitable owner thereof.

That the American Company regards as a vitally operative fact on the question of its legal obligation to procure a franchise or license grant from the City, the fact of ownership of any part of its operating plant located in the streets of the city, is indicated by the reply made to an inquiry from this department, directed to the American Telephone and Telegraph Company of New York, at its Chicago office, 212 West Washington street, Chicago, Ill. That reply is signed by W. E. Bell, Division Commercial Superintendent, and is as follows:

“I beg to advise that you are right in your understanding that no franchise ordinance has been granted to this Company by the City of Chicago. As you may know, this Company’s lines are outside the City of Chicago and connect with the lines of the Illinois Bell Telephone Company at points beyond the city limits. This company has no lines in the streets of the City.”

It seems the shifting of the “ownership” of that part of the American Company’s plant located in the city’s streets was not sufficient to meet the question of the Company’s right to operate in the City, so another attempt is made to meet the situation through the writing of a second letter, by the Chicago Telephone Company to the American Telephone and Telegraph Company and accepted by the latter company. That letter states that the Chicago company has purchased from the American Company the long distance switchboards located in the toll building on Franklin street, near Washington, and the Morrell Park Test and Operating Station, and the contents thereof at a price to be determined by appraisal. But it is also expressly provided that when this price has been ascertained, the Chicago Company shall be entitled to an amount which will represent a reasonable re-

turn on the investment and the cost of maintaining the property; and it shall also be entitled to a proper return on the investment and cost of maintenance of any additional switchboards or facilities supplied on account of the long distance traffic. This further interesting provision is made in the letter:

“We will take over into our employment, as of September 1, 1913, all of the employes now in the service of the A. T. & T. Company necessary to conduct the long distance traffic in Chicago, and the amount of their compensation shall be charged for in addition to the amount referred to above plus 10%.”

By the foregoing arrangement it is made to appear that certain parts of the operating plant and equipment owned and operated by the American Telephone and Telegraph Company in the conduct of its own business in Chicago, has been transferred to the Chicago Company similarly as the transfer of that part of its plant located in the City's streets, and likewise upon the guaranty that the Chicago Company shall have a reasonable return on its investment from the American Telephone and Telegraph Company's business in the City. And in order to create the appearance thereafter that the American Telephone and Telegraph Company's business in Chicago is conducted by the Chicago Telephone Company, it is agreed that the Chicago Company shall “take over into (their) employment * * * all of the employes *now in the service of the A. T. & T. Company necessary to conduct the long distance traffic in Chicago, and the amount of their compensation shall be charged (to the A. T. & T. Co.).*”

Another letter in the files of this department, written by the American Telephone and Telegraph Company, calls attention to the enclosure “Herewith (of) a copy of memorandum regarding Long Line situation in Chicago.” The memorandum enclosed is entitled:

“Data Regarding Routine Existing for the Handling of Accounting between the A. T. & T. and Chicago Telephone Companies in connection with expense incurred within the city limits of Chicago.”

This memorandum pertains exclusively to the business of the American Telephone and Telegraph Company conducted in the City of Chicago and prescribes the rules which are to govern the Chicago Telephone Company in its apparent conduct of the American Company's business.

Some of the more noteworthy of these rules are here set out, to wit:

"(a) District Plant chief and his cashier are considered as Joint Men and are carried on A. T. & T. roll. All other employes under the District Plant Chief located in the City of Chicago are considered joint employes and carried upon the Chicago Telephone Company's roll." (Chicago company, however, reimbursed by the A. T. & T. Co. for this payment.)

"(e) The Chicago Telephone Company adds 10% to all bills against us except those for rental of plant.

"(f) All leased Line expense incurred by the District Plant Chief's forces inside the City limits is first paid by the Chicago Company and in turn is billed against the A. T. & T. Company plus 10%."

The "Memorandum" concludes with the following:

"No change whatever has been made in the methods of handling work in the City. When A. T. & T. line or equipment gangs are brought in to do estimate work they are furloughed on A. T. & T. rolls and carried on the rolls of the Chicago Telephone Company."

The foregoing memorandum shows that the business and operations of the American Telephone and Telegraph Company in the City of Chicago are as completely controlled, directed and dominated by the American Telephone and Telegraph Company since the foregoing paper arrangements, adjustments and transfers as before. And the foregoing correspondence sustains the conclusion that since the granting of the franchises by the Towns of Jefferson and Lake the American Telephone and Telegraph Company has constructed and installed its lines and plants in the City of Chicago and has ever since remained in the absolute and exclusive possession, control, use, enjoyment and benefit thereof, operating them continuously and exclusively in the conduct of its

own long distance telephone business in and out of the City of Chicago.

Further evidence to sustain this view, and also to establish the fact that no material change has occurred since the acquisition by the Illinois Bell Telephone Company of the franchise and rights of the Chicago Telephone Company, is found in the record admission of Mr. U. F. Cleveland, General Auditor of the Illinois Bell Telephone Company, made on his cross-examination at the recent rate hearing before the Illinois Commerce Commission. The record, page 3568, of *Illinois Commerce Commission v. Illinois Bell Telephone Co.*, No. 11894, shows Mr. Cleveland's testimony to be as follows:

"It is my understanding that the Illinois Company makes no use of that plant (that is the so-called long distance plant transferred by the A. T. & T. Co. to the Chicago Telephone Company) except so far as messages are transmitted over that plant for connection with the American Company's plant beyond. *That is it is used practically as part of the American Company's plant except that title is in the Illinois Company which is paid a rental for the use of it. That plant is used exclusively for the long lines business of the American Company.*"

The foregoing is only a bit of the evidence in the record of the case of the *Illinois Commerce Commission v. Chicago Telephone Co.*, now the Illinois Bell Telephone Company, relative to rates, which sustains the following finding of fact stated in the Commission's last order of August 16, 1923, to wit:

"The Illinois Bell Telephone Company besides receiving 17c per message, receives rental from the American Telephone and Telegraph Company for certain property owned by the Illinois Bell Telephone Company and used exclusively by the American Telephone and Telegraph Company. Besides this, the American Company is billed for expenses incurred by the Illinois Bell Telephone Company in connection with the *operation of said property used exclusively by the American Company.*"

As evidence of the spirit, purpose and policy of the American Telephone and Telegraph Company to control and

dominate the entire telephone situation, both local and long distance, to direct the affairs of the local telephone company, to influence and fix telephone rates in the city, and, inferentially, as evidence of the company's purpose to evade its legal obligations, particularly its duty to obtain from the City of Chicago a grant of license to operate its long line telephone system in the city and to pay a just compensation for the use of the city's streets, we quote at some length from the last order of the Illinois Commerce Commission made in the rate hearing case above referred to.

The Commission reports as an item of revenue or income of the Illinois Bell Telephone Company for the year 1922, "Toll service revenue," \$2,655,988; and proceeding, the Commission finds as follows:

"Toll Service Revenues, as the name indicates, is that revenue received from toll calls and is largely received as toll commission from the American Telephone and Telegraph Company.

The record in the present case shows that there is a considerable amount of toll business originating within the City of Chicago which is transmitted over the lines of the American Telephone and Telegraph Company. The Chicago Division of the Illinois Bell Telephone Company receives 17 cents per message on all messages of this kind originating in the City of Chicago. The record also shows that the company receives no compensation in the form of a terminating commission for messages coming from the American Telephone and Telegraph Company which terminate in the City of Chicago. The company claims that the 17 cents is intended to be full compensation to the Illinois Bell Telephone Company for services performed in connection with incoming messages as well as outgoing messages, although it is computed only on the outgoing messages * * *. The 17 cents originating commission which is paid to the Illinois Bell Telephone Company is the only compensation which this company receives for the use and operation of its exchange property in connection with the calls sent or received over the lines of the American Telephone and Telegraph Company. The record shows that the 17 cents commission was determined in 1910 from a study made at that time of the cost of performing this service.

Since that date the cost of operation and cost of plant used has increased, and the record also shows that both the American Telephone and Telegraph Company and the Chicago Company have increased their telephone rates to a considerable extent within this period of time.

The Commission believes that this matter should be fully investigated and an equitable adjustment made to the end that a greater part of the toll charges be paid to the Illinois Bell Telephone Company."

The issue of proper division of the toll receipts for long distance messages was raised and decided by the U. S. District Court in the case of *Southwestern Telegraph and Telephone Company v. City of Houston*, and the court decision and opinion said, 268 Fed. 878:

"It is contended by the defendant that the plaintiff, who owns certain toll lines running out of Houston, has not credited to the Houston exchange its just proportion of toll receipts for long distance messages. The proportion so credited is 25 per cent on all long distance tolls collected in Houston which the master found was greater than that allowed any one of the eight independent exchanges in the state by independent long distance toll lines with which they connect, that the rate is the same as that allowed the Houston by independent long distance lines running to Houston and that the rate is larger than that paid by the plaintiff company to over 300 independent exchanges. Furthermore, 25 per cent to the exchange, the master found, is the customary allowance made by state commissions throughout the country, and that it is not practical to segregate the cost of handling long distance messages or between local exchanges and long distance lines. The court sustains the division, as the usual and customary one. See *Cumberland Telephone and Telegraph Company v. Louisville* (C. C.), 187 Fed. 637."

We are informed that the American Telephone and Telegraph Company enjoys a monopoly of the long distance business in the City of Chicago. If this be true and the standard of division of receipts for long distance messages as approved by the court in the case just cited should be applied to the American Telephone and Telegraph Company, then

that company should have paid to the Illinois Bell Telephone Company approximately 50 per cent more than \$2,655,988 reported to have been received by the local company as its share of the long distance toll messages. And this is computed upon the basis of payment for outgoing messages, although we understand the rule of division approved by the court, *supra*, is 25 per cent applied to incoming as well as outgoing messages.

Resuming our quotation from the Illinois Commerce Commission's last order in the rate hearing case:

"The next item in the income account as set up hereinabove that should be discussed is the entry for Licensee Revenue Dr. in the amount of \$1,606,810. This is the amount paid by the Chicago Division of the Illinois Bell Telephone Company to the American Telephone and Telegraph Company for services rendered and rental on transmitters, receivers and induction coils owned by the latter company and used by the Illinois Bell Telephone Company. These prices of equipment are a part of the subscribers' sets and are used every time a telephone call is made.

The record shows that the American Telephone and Telegraph Company owns about 98 per cent of the stock of the Illinois Bell Telephone Company. The so-called licensee contract between the American Telephone and Telegraph Company and the Illinois Bell Telephone Company was not made between companies dealing at arm's length but was made between the principal company and its subsidiary. Because of the overwhelming stock ownership by the American Telephone and Telegraph Company in the Illinois Bell Telephone Company and the consequent domination of the Board of Directors of the Illinois Bell Telephone Company it can hardly be said that the so-called contract was made between separate parties. In view of these facts the Commission may well question whether or not the Illinois Bell Telephone Company receives services in proportion to the amount it pays to the American Telephone and Telegraph Company. There is no evidence in the record to show the cost to the American Telephone and Telegraph Company of the services rendered to the Illinois Bell Telephone Company. The Commission believes from all the circumstances surrounding the payments made by the Illi-

nois Bell Telephone Company to the American Telephone and Telegraph Company and the services rendered by the latter to the former, and the cost thereof should be at some time fully investigated, to the end that charges for the services may be properly established * * *."

Concerning another phase of the investigation of the relation between the Long-line and local company, the Commission makes the following finding:

"In considering operating expenses it is to be remembered that much of the material used by the Illinois Bell Telephone Company in its operation of its property is purchased from the Western Electric Company. The record shows that the American Telephone and Telegraph Company owns 98 or 99 per cent of the stock of the Western Electric and the Illinois Bell Telephone Companies. The parent company can dictate prices which the Western Electric Company may charge and the Illinois Bell Telephone Company must pay for these materials. Here again we have two corporations who are dealing with one another not at arm's length. There is not sufficient evidence in this record to pass upon the question as to whether or not the Illinois Bell Telephone Company purchases from the Western Electric Company its necessary materials and supplies at a fair cost. Certainly, it can be said that in view of the relationship here existing transactions between these two companies would require close scrutiny in order that no unjust advantage may be taken by the controlling company."

A similar situation was involved in the case of *Southwestern Telegraph and Telephone Company v. City of Houston*, *supra*, and the U. S. District Court, in its opinion, said in reference to it:

"The scope of the inquiry in this case cannot be extended to the determination of a fair rate of profit to the American Telephone and Telegraph Company on its capital invested, or to such a rate of profit to the Western Electric Company, which is not a public service corporation, but a private corporation engaged in the business of manufacturing telephone apparatus. The problem presented by the relations of such holding and subsidiary corporations are serious ones, which vitally affect

the public interest, but they are problems which primarily call for legislative consideration.

The fact that the American Telephone and Telegraph Company dominates and controls both the plaintiff company and the Western Electric Company is sufficient to cause the courts to very closely scrutinize any dealings between these corporations whereby any unjust advantage might be taken by the parent company, or the effect of which might be to enable it to receive a larger return than that which forms the basis of the established rate for telephone service to the public. Such corporations, however, are not debarred from entering into contracts with each other, and where such contracts are fair and advantageous to the subordinate corporation, they will be recognized and given effect."

It is not our purpose to go further into this phase of the case, which has to do with the reasonable rates that may be charged by the Illinois Bell Telephone Company for the various kinds of local telephone service it renders to the people of Chicago. This branch of the case has just recently been considered by the Illinois Commerce Commission in the proceeding already referred to and an order issued by the Commission materially reducing the rates to be charged for local telephone service. The Illinois Bell Telephone Company has applied to the U. S. District Court for a permanent injunction against the enforcement of the Commission's rate order on the alleged ground that the new rates are in effect confiscatory and in violation of the 14th Amendment of the Federal Constitution.

There has been filed in the U. S. District Court in that case an able and exhaustive brief in behalf of the City of Chicago, in your name, as Corporation Counsel, and in the name of special counsel Stephen A. Foster and James Dale Thom. We refer to this brief for the consideration it gives to the relationship existing between the American Telephone and Telegraph Company and the Illinois Bell Telephone Company as affecting telephone rates, for such enlightenment as it may give us in our study of the relationship really existing between these two companies under this their so-called agreement or arrangement by which they seek to bring into the City of

Chicago the long distance business of the American Telephone and Telegraph Company, over the lines of one or the other or both of said companies, without any grant of license or permit therefor and without any compensation whatever for the use of the city's streets or fee for its police supervision. Our brief is intended to cover the latter phase of these companies' operations, and we are submitting the following opinion on the law of the case with the firm conviction that the attempt of the American Telephone and Telegraph Company, with or without, the aid of its subsidiary the Illinois Bell Telephone Company, to operate a long distance telephone system in Chicago without a grant of license from the City and without just compensation, is illegal and therefore, must prove futile.

It appears that the American Telephone and Telegraph Company has taken just four steps to meet the question of its right to operate in the city without franchise, or license, namely:

(1) Entered into the foregoing trust arrangement which purports to transfer to the Chicago Telephone Company the bare legal title or "ownership" of its plant located in the streets of the City.

(2) Likewise transferred part of its operating plant used in the conduct of its business in the City.

(3) Transferred all its employes engaged in the conduct of business in Chicago to the payroll of the Chicago Telephone Company, reimbursing said Company, however, for its employes compensation so advanced by the Chicago Telephone Company.

(4) Pays by way of compensation to the Chicago Telephone Company for all the business it derives from the City of Chicago, 17c on each message going out of the City and a rental for the property its correspondence purports to have conveyed to the Chicago Company. For detailed information and study we append hereto a "Comparative Statement of Illinois Bell Telephone Company's Proportion of Toll Revenue," furnished us from the office of the City Comptroller by Martin J. O'Brien, Comptroller.

COMPARATIVE STATEMENT OF ILLINOIS BELL TELEPHONE COMPANY'S
PROPORTION OF TOLL REVENUE.

Message Tolls		1914	1915	1916	1917	1918
510—Originating Com'n @ 12c		86,323.11	93,194.51	44,980.65	47,813.00	122,194.20
510—Pro Rate on Joint Calls		62.26	62.26	62.26	110.16	110.16
505—Commission @ 5c		35,943.95	38,532.00	44,980.65	47,813.00	50,361.10
510—Use of Plant		160,251.50	194,335.72	169,990.59	182,853.00	222,535.15
Total C. T. Co. prop'n T.M.		282,580.832	326,124.49	323,783.00	346,453.16	395,200.61
Leased Lines						
512—Rental of Plant		212.21	6,550.25	5,729.69	6,164.40	7,503.10
514—Rental of Plant		848.05	26,201.01	22,918.72	24,657.74	30,011.79
512—Prop'n of Leased Lines		156.08	637.50	802.08	1,011.44	1,105.02
514—Prop'n of Leased Lines		624.34	425.00	605.10	1,159.26	1,717.17
Total,—		1,840.68	33,813.76	30,055.59	32,992.84	40,337.08
Message Tolls		1919	1920	1921	1922	1923
510—Originating Com'n @ 12c		168,087.74	203,072.30	212,907.00	236,237.24	127,893.52
510—Pro Rate on Joint Calls		110.16	110.16	110.16	110.16	55.08
505—Commission @ 5c		70,036.55	84,613.45	88,711.25	98,432.15	*81,120.18
510—Use of Plant		280,159.07	390,112.38	454,162.75	553,897.82	301,222.24
Total C. T. Co. prop'n T.M.		518,393.52	677,918.29	755,891.16	988,677.37	510,296.02
Leased Lines						
512—Rental of Plant						10,153.72
514—Rental of Plant						40,614.85
512—Prop'n of Leased Lines						358.43
514—Prop'n of Leased Lines						1,429.12
Total,—						52,556.12

* Includes rental Special Terminal Loop.

PROPOSITIONS AND POINTS.

I.

Nature and status of the American Telephone and Telegraph Company.

- a. New York corporation.
- b. Operating long-distance telephone system throughout the States.
- c. Engaged in interstate commerce, and subject to regulation by the Interstate Commerce Commission.
- d. Is a quasi-public corporation, and subject to legislative control and the power delegated to municipalities to control and regulate the use of their streets.

II.

The Federal statute, known as the Post Roads Act of 1866, confers no authority on the American Telephone and Telegraph Company to maintain and operate telephone lines in Chicago without franchise or license.

- a. Act authorizes construction and operation of telegraph lines over the post roads of the United States.
- b. Post roads embrace city streets.
- c. Act applies to telegraph lines and not to telephone lines.
- d. Right or franchise granted by Act is subordinate to public and private rights.
- e. Does not affect police power of state, nor abridge powers of municipalities over the use and occupancy of their streets.

III.

The interstate commerce character of the American Telephone and Telegraph Company does not warrant that company's operations in Chicago without franchise or license.

- a. Subject to the reasonable exercise of the police power of the State and its municipalities.

b. Occupation and use of city's streets cannot be denied, but reasonable compensation therefor may be exacted and proper supervision imposed.

I V .

The ordinances of the Town of Lake and the Village of Jefferson afford no warrant for the American Telephone and Telegraph Company's operation in the City of Chicago without franchise, license or permit.

a. Ordinances lapsed and terminated by annexation of town and village to city in June, 1889.

b. Not binding upon City by annexation.

c. Grants for unlimited period cannot extend beyond the lives of the grantors.

d. Company abandoned these ordinance grants.

e. These grants did not pass to Chicago Telephone Company upon purchase of the physical property of the American Telephone and Telegraph Company.

f. Any rights under these ordinances that might have passed to the Chicago Telephone Company were expressly waived by that company by acceptance of Ordinance of November 6, 1907.

V .

The general law governing the rights and obligations of Telephone and Telegraph Companies in the City of Chicago.

a. The Telegraph Act of March 24, 1874.

b. Telegraph Act applies to telephone companies.

c. The Telephone Act of May 16, 1903.

d. Acts do not interfere with control of streets vested in municipalities.

e. Acts, in *pari materia*, construed together.

f. May construct lines only with city's consent.

g. May be removed from streets if consent is not obtained.

V I .

What status and right has the American Telephone and Telegraph Company in the City of Chicago by virtue of the ordinance of November 6, 1907, which grants to the Chicago

Telephone Company the right to establish a telephone system in the city?

a. For twenty years prior to 1911, when agreement was had with Chicago Telephone Company, the American Telephone and Telegraph Company constructed and maintained its long line system in Chicago in violation of state law and the right of the city, paying no compensation or license fees.

b. Since 1911 the A. T. & T. Co. has relied and still relies on its "arrangement" with the Chicago Telephone Company and that Company's rights under the ordinance of November 6, 1907, for the legality of its continued occupancy of the city's streets without franchise, license or permit from the city.

c. Said agreement is invalid for the purpose, and the Chicago Telephone Company was powerless to transfer its license to aid the American Telephone and Telegraph Company in its effort to evade the city's power under the law.

VII.

The Ordinance of November 6, 1907, granted permission and authority to the Chicago Telephone Company to construct, maintain and operate a local telephone exchange system in and for the City of Chicago; and that ordinance cannot be so construed as to authorize the construction or purchase and operation, in whole or in part, of any long-distance telephone system or line.

a. A material distinction exists between a local telephone exchange and a long-distance telephone system.

b. Long-distance system is chiefly for the benefit of persons outside the municipality, while the local telephone exchange system concerns wholly or mainly the inhabitants of the municipality.

c. An ordinance authorizing one telephone system does not authorize the construction and operation of the other.

d. Ordinance and practical construction held not to warrant subsequent erection and operation of the other kind of telephone system.

e. Ordinance so general in terms as to constitute an unlimited grant, yet held under the facts to authorize only a long-distance system.

f. The ordinance to the Chicago Telephone Company grants right to construct and maintain a local telephone exchange only.

g. Practical construction of this ordinance by both telephone companies made the Chicago Telephone Company an exclusively local telephone exchange company within the city and the American Telephone and Telegraph Company exclusively a long-distance company operating its own line in the city.

h. Sec. 3 of Ordinance November 6, 1907, provides merely for compensation to be based on long-distance toll receipts, and does not authorize a long-distance business by the Chicago Telephone Company itself.

i. A long-distance telephone company operating under ordinance subsequently secured the passage of another ordinance to install improvements, but so general in terms as to warrant contention that it granted right to install local telephone exchange; construed not to authorize the other system.

j. No implication can be invoked in aid of ordinance construction so as to establish grant to operate a particular telephone system.

k. In cases before the court every telephone company founded its contention and right to operate upon some ordinance. Neither the American Telephone and Telegraph Company nor the Chicago Telephone Company have any grant of right whatever to operate a long-distance telephone system in Chicago.

VIII.

One company under the grant of the right to use the streets cannot under its franchise confer a similar right upon a separate and distinct company without the consent of the municipality.

a. Held that a system of local messenger call boxes could not be installed by a separate company, organized for the purpose, under a permit granted to the Western Union Telegraph Company.

b. Held that Western Union Telegraph Co. "was subject to control of the city and could not, in defiance

of its reasonable regulations, erect poles and stretch wires without let or hindrance."

c. The distinction made by the courts between city street railways and the "commercial" or interurban railroads applies to establish the similar distinction of long-distance telephone systems and local telephone exchanges.

d. Case of *City of Aurora v. Elgin Traction Co.*, 227 Ill. 485 directly in point.

e. When grant is made to use the streets, upon the express condition that other like companies shall have the right to use the tracks, poles, wires, etc., of such company, such other company cannot exercise such right without first obtaining the consent of the city.

IX.

The maintenance and operation by the Chicago Telephone Company or its assignee the Illinois Bell Telephone Company, either for itself or for the American Telephone and Telegraph Company of a long distance telephone system in the City of Chicago, constitutes a new and additional servitude not authorized by the ordinance of November 6, 1907, which cannot be imposed without special grant of license.

a. An ordinance grant to construct and operate one kind of telephone system will not authorize the construction and maintenance of the other.

b. A railway already occupying the streets for passenger traffic cannot, without a new franchise, use such occupied streets for purposes of commercial railroad or for carrying freight.

c. A telephone company authorized by ordinance to furnish telephone service at fixed rates, cannot, furnish "improved" telephone service at higher rates under special contracts with patrons, for such telephone service as not authorized by the grant.

d. *City of Aurora v. Elgin Traction Co.*, 227 Ill. 485, directly in point.

X.

Authority of the City of Chicago over its streets is not abrogated or affected by the contract or so-called agreement

or "arrangement" between the American Telephone and Telegraph Company and the Chicago Telephone Company, and such agreement does not relieve either of said companies of the legal duty to obtain from the City Council of Chicago a grant of license to maintain and operate a long-distance telephone system in the City.

a. *City of Aurora v. Elgin Traction Co.*, 227 Ill. 485, involves a contract between the "Joliet" interurban railroad and the Aurora street railway, for the use by the former company of the tracks of the latter company in the streets of Aurora. Held that such contract in no way abrogated the city's power over its streets and gave no right under the Aurora Company's ordinance to the Joliet company to use the streets without the city's consent.

b. There is no authorization in the Telephone and Telegraph acts, such as is found in the general railway act, for similar contracts between telephone companies.

c. *Illinois Midland Railway Co. v. The People*, *ex rel.*, 84 Ill. 426, explained.

XI.

The agreement between the American Telephone and Telegraph Company and the Chicago Telephone Company is *ultra vires* the Chicago Telephone Company.

a. The Chicago Telephone Company, if licensed to own and operate the long distance line, has not the power under its charter to sell or dispose of by lease its entire long-distance lines.

b. Could not by one and the same contract purchase from and lease to the American Telephone and Telegraph Company that company's offending long line for the obvious purpose of attempting to legalize under its own ordinance franchise what the American Company cannot do without a franchise ordinance of its own.

XII.

The agreement between the two telephone companies is void, not only because it is *ultra vires*, but also for the reason that it violates public policy.

a. Any contract which disables a corporation from performing its functions under its franchise is injurious to the public good, violates the obligation to the State and is void as against public policy.

b. The Public Utilities Act, though not in force when this contract was made, shows that such contracts have always been opposed to the State's public policy.

c. Void as against public policy because "adopted for and adapted to" the creation of monopoly.

XIII.

If the agreement between the telephone companies be valid, it does not have the effect to terminate, or even cause a cessation of the American Telephone and Telegraph Company's long and unauthorized use and occupation of the City's streets; nor does it make possible such continued use and occupation without franchise, license or permit from the Chicago City Council.

a. Purpose of arrangement was merely to leave the naked legal title in the Chicago Telephone Company.

b. Agreement provided for retention by the American company of the exclusive possession, use, control and benefit of long distance plant.

c. American Telephone and Telegraph Company by this arrangement with the Chicago Company merely changed its character from that of owner to that of lessee of the trespassing plant.

d. A franchise to erect and operate a telephone plant authorizes the purchase or lease of one. If purchased or leased without accompanying franchise, a franchise must be procured to maintain and operate the system.

XIV.

The powers of the City of Chicago under the law pertaining to the present status of the American Telephone and Telegraph Company and the Illinois Bell Telephone Company, assignee of the Chicago Telephone Company.

a. Subject only to constitutional limitations state has absolute control over streets and highways.

b. Power delegated to municipalities and liberally construed.

c. Telephone and Telegraph Acts recognize in municipalities the complete exercise of police power over the erection and maintenance of telephone lines located within their limits.

d. May exact compensation for use of streets and collect reasonable fees for police supervision and license.

X V .

The City of Chicago is not precluded or estopped by any action or inaction on its part in any proceeding against the telephone companies for their occupation and use of the city's streets without grant of franchise, license or permit therefor.

a. Statutes require consent of city to be given by corporate authorities, and this means the City Council acting by ordinance.

b. Administrative officers cannot waive the necessity of procuring consent from the Council by ordinance.

c. Administrative officers cannot, by acquiescing in the use of a public way by a utility company, estop the city to terminate the use.

d. Application of *estoppel in pais* against the municipality not favored.

e. Facts and cases sustaining estoppel.

f. No such facts and no cases to sustain estoppel against power of City to terminate the unauthorized use and occupation of its streets by either or both of the telephone companies.

g. The facts that face both companies to preclude their contention of estoppel against city.

h. Filing reports in comptroller's office, showing receipt for rentals from American Telephone and Telegraph Company for use of long distance line, and paying compensation thereon, does not constitute estoppel.

X V I .

Remedies and procedure.

a. Initial action by the City Council against unauthorized occupation of city's streets and direction to remove obstruction.

b. Injunction sought by city.

- c. *Quo warranto* under the statute.
- d. New ordinance for local telephone company upon expiration of ordinance of November 6, 1907.

L A W .

I .

NATURE AND STATUS OF THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY.

The American Telephone and Telegraph Company, organized and operating as a New York corporation, maintains a system of telephone and telegraph wires for long distance communication or "the transmission of intelligence by wire" throughout the States, is engaged in interstate commerce and is, therefore, subject to the exclusive commerce powers of Congress and the regulation of the Interstate Commerce Commission.

Sec. 1, Interstate Commerce Act.

41 Stat. L., 474.

Western Union Telegraph Co. v. Pendleton, 122 U.

S. 347, 30 L. Ed. 1187.

Northwestern Tel. Exch. Co. v. City of St. Charles,
154 Fed. 386.

The particular business of the company is that of transmitting telephone and telegraph messages for the general public, devoting its system and operation to that public use, and receiving from the public valuable franchises, rights and benefits. It is therefore a quasi-public corporation or utility and, like all such corporations, is subject to legislative control and regulation.

The People v. Chicago Telephone Co., 220 Ill. 238,
77 N. E. 245.

Hocker v. State, 105 Ind. 250, 5 N. E. 178, 55 Am.
Rep. 201.

Marshfield v. Wisconsin Tel. Co., 102 Wis. 604, 78 N. W. 735, 44 L. R. A. 565.

Michigan Tel. Co. v. City of Charlotte, 93 Fed. 11.

Southern Bell Tel. Co. v. Mobile, 162 Fed. 523, 44 C. C. A. 147.

It is especially subject to the police power vested by legislative grant in the municipal corporation for controlling and regulating the use and occupation of the city's streets.

Dillon Mun. Corp. (5th Ed.), Vol. 3, Sec. 1220.

Springfield v. Postal Telegraph Cable Co., 253 Ill. 364.

Southern Bell Tel. & Tel. Co. v. City of Richmond, 103 Fed. 31.

Cumberland Tel. & Tel. Co. v. City of Evansville, 127 Fed. 195, affirmed 143 Fed. 238.

People ex rel. N. Y. Elec. Lines Co. v. Squires (N. Y.), 14 N. E. 820, 1 A. S. R. 893, 145 U. S. 175, 12 Sup. Ct. 880.

State ex rel. Laclede Gas Co. v. Murphy (Mo.), 31 S. W. 594, 31 L. R. A. 798, 170 U. S. 78, 18 Sup. Ct. 505.

Denver v. Mountain State Tel. & Tel. Co. (Colo.), 184 Pac. 604.

II.

THE FEDERAL STATUTE, KNOWN AS THE POST ROADS ACT OF 1866, CONFERS NO AUTHORITY ON THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY TO MAINTAIN AND OPERATE TELEPHONE LINES IN CHICAGO WITHOUT LICENSE OR FRANCHISE.

The Act of Congress of July 24, 1866, known as the Post Roads Act, authorizes all telegraph companies accepting its provisions, to construct, maintain and operate lines of telegraph over the public domain and the military and post roads of the United States. 14 Stat. L. 221; Rev. Stat., Sec. 5263, *et seq.* And the term "post roads" embraces the streets of a city. *St. Louis v. Western Union Telegraph Co.*,

148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; *People v. Commissioners*, 166 N. Y. S. 41.

But the Supreme Court of the United States has construed the Post Roads Act as having no application to telephone companies and as not applying to the telephone lines of a company operating both telephone and telegraph systems.

Richmond v. Southern Bell Telephone and Telegraph Co., 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162.

Sunset Telephone and Tel. Co. v. Pomona, 164 Fed. 561, affirmed 172 Fed. 829.

Cumberland Tel. and Tel. Co. v. Evansville, 127 Fed. 187, affirmed 143 Fed. 238.

Postal Telegraph Co. v. State Highway Com., 276 Fed. 958.

By all the authorities the Post Roads Act is construed as permissive merely, creating a federal franchise which is subordinate to both public and private rights. The Act does not affect the police power of the State, nor does it abridge the extensive powers usually vested in the municipalities to regulate the occupancy and use of their streets.

Dill. Mun. Corp. (5th Ed.), Vol. III, p. 1926, Sec. 1220; 26 R. C. L. 501. Sec. 17.

St. Louis v. Western Union Telegraph Co., 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380.

Sunset Telephone and Telegraph Co. v. Pomona, *supra*.

Southern Bell Tel. & Tel. Co. v. Richmond, 103 Fed. 31.

City of Springfield v. Postal Tel. Cable Co., 253 Ill. 346, affirming 164 A. 246.

City of Toledo v. Western Union Tel. Co., 107 Fed. 10.

In the case of *Richmond v. Southern Bell Telephone and Telegraph Company*, *supra*, the complainant telephone company claims it had entered upon and secured the use of the

streets and alleys of the City of Richmond for its poles and wires under the authority of the Act of Congress, July 24, 1866, and that under this Act it was entitled to maintain and operate its lines through and over the streets and alleys of Richmond, without regard to the consent of said city. This contention was sustained and the injunction granted by the U. S. Circuit Court. The Supreme Court of U. S., however, reversed the decree, holding that the Act of 1866 had no application to telephone companies, and remanded the case to the Circuit Court with instructions to determine "What rights the appellee (Southern Bell Tel. and Tel. Co.) had or has under the laws of Virginia and the ordinances of the City of Richmond." On the second appeal of the case (*Southern Bell Tel. & Tel. Co. v. Richmond, supra*), the U. S. Circuit Court of Appeals, in affirming the decree of the Circuit Court, said:

"The opinion of this court, while adjudging that the complainant company had all the privileges and protection granted by the Act of 1866, had also adjudged that such rights and privileges were to be enjoyed in subordination to public use and private rights, and subject to any lawful exercise of the police power belonging to the State or one of its municipalities. This was approved and affirmed by the Supreme Court in its opinion. The cause, having been remanded, was heard in the Circuit Court. That court held that, under the laws of Virginia, and the ordinances of the City of Richmond, the Southern Bell Telephone and Telegraph Company has no right to use the streets of that city. For this reason it denied the relief asked, dissolved the injunction theretofore granted, and dismissed the bill."

The United States Circuit Court of Appeals, in *City of Toledo v. Western Union Telegraph Co., supra*, said:

"We think in taking that position it (Telegraph Co.) was mistaken as there was no intention on the part of the federal government in permitting the complainant to use its post roads to dispossess the state and municipalities of the control of them, but the permission was given like any other franchise granted to a corporation, to be exercised in subordination to both public and private rights."

III.

THE INTERSTATE COMMERCE CHARACTER OF THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY DOES NOT WARRANT THAT COMPANY'S OPERATIONS IN CHICAGO WITHOUT FRANCHISE OR LICENSE.

All the authorities cited in support of the proposition that the rights conferred by the Post Roads Act of 1866 are subordinate to the reasonable exercise of the police power of the State and its municipalities sustain with equal force the proposition that the interstate commerce character of a company's business does not exempt the company from such police power exercise. This is for the reason that corporations securing the benefits of the Post Roads Act are, generally speaking, engaged in interstate commerce, and the power of Congress over the post roads is as exclusive against the State as its power over interstate commerce. In each of the following cases both contentions made against the city's exercise of the police power were overruled:

Michigan Telephone Co. v. City of Charlotte, 93 Fed. 11.

City of Peoria v. Postal Cable Co., 274 Ill. 568.

Peoria v. Western Union Telegraph Co., 275 Ill. 568.

St. Louis v. Western Union Telegraph Co., 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380.

In *Michigan Telephone Co. v. City of Charlotte*, *supra*, the court says:

"It is further contended that the action of the common council of the city constitutes an unlawful interference with commerce between the several states. Assuming that this rule applies to telephonic communication as a means of such commerce, it is to be observed that the clause in the constitution which gives to Congress the control of interstate commerce does not preclude the exercise of power in the states to impose regulations designed for the safety of the local public. (Citing numerous cases.)"

In the case of *City of Peoria v. Postal Telegraph Co.*, *supra*, the Supreme Court of Illinois, after deciding that the Post Roads Act of 1866 afforded no ground against the police power action of the City Council, said:

"It has been frequently held that a telegraph Company, though engaged in interstate commerce, may be compelled by a municipality to pay a reasonable charge to defray the cost of local governmental supervision and inspection of its poles and wires. In some instances such charge has been imposed and upheld as a rental where the municipality has such an interest in its streets as entitles it to make a rental charge and such rental is not shown to be unreasonable. (*City of Springfield v. Postal Tel. Co.*, 253 Ill. 364; *City of St. Louis v. Western Union Tel. Co.*, *supra*.) A municipality may also require such a telegraph company to pay a license fee not to exceed the probable expenses incident to the issuing of the license and to such supervision, regulation and inspection. *Atlantic and Pacific Tel. Co. v. Philadelphia*, 190 U. S. 160; *Western Union Tel. Co. v. New Hope*, 187 *id.* 160; *Postal Tel. Co. v. Taylor*, 192 *id.* 494."

In *St. Louis v. Western Union Tel. Co.*, *supra*, Justice Brewer says, respecting the Federal Act of 1866 and interstate commerce:

"It may also be affirmed that it (the Post Road Act) carries with it no exemption from the ordinary burdens which may be cast upon those who would appropriate to their exclusive use any portion of the public highways (p. 102)."

And again he says:

"Indeed it may be observed, in the line of the thoughts heretofore expressed, that this charge (\$5 per annum for each telegraph pole in the streets, alleys and public places in the City) is one in the nature of rental; that the occupation by this interstate commerce company of the streets cannot be denied by the city; that all that it can insist upon is, in this respect, reasonable compensation for the space in the streets thus exclusively appropriated."

(pp. 104, 105.)

Northwestern Tel. Exch. Co. v. City of St. Charles,
154 Fed. 386.

Dillon Mun. Corp. (5th Ed.), Vol. 3, Sec. 1220, p. 1924.

37 Cyc. 1632, 1633.

The exercise of the police power, however, must not conflict with the exclusive power of Congress to regulate interstate commerce.

New England Tel. Co. v. Town of Essex, 206 Fed. 926.

Western Union Tel. Co. v. Pendleton, 122 U. S. 347, 30 L. Ed. 1187.

IV.

THE ORDINANCES OF THE TOWN OF LAKE AND THE VILLAGE OF JEFFERSON AFFORD NO WARRANT FOR THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY'S OPERATIONS IN THE CITY WITHOUT FRANCHISE, LICENSE OR PERMIT.

The ordinance of the Village of Jefferson, passed January 9, 1899, and the ordinance of the Town of Lake, passed February 12, 1889, authorizing the American Telephone and Telegraph Company to construct, maintain and operate their lines in these suburban municipalities, lapsed and terminated with the annexation of the village and town to Chicago in June, 1889. Thereafter these ordinances were not effectual to sustain any right to continue operation by the Company in the annexed territory, nor were they binding upon the City of Chicago by reason of such annexation.

These ordinances do not appear in the work entitled "Special Ordinances of Chicago, Hoover, 1915," a compilation, started, continued and completed under the auspices of the Corporation Counsel of the City during the enueumbency of William H. Sexton, John W. Beckwith and Richard S. Folsom, as Corporation Counsel. In the "Preface" to this work it is said:

"Only such ordinances are printed in full herein as appear to be in force at the date of this publication and only such ordinances, passed by annexed towns and

villages are contained herein as granted rights for a definite or fixed term of years, except such as purported to grant rights of way to railroad companies, inasmuch as ordinances granting rights for an indeterminate term or in perpetuity under the decisions of our courts become ineffective upon annexation."

This proposition was directly involved and decided in the case of *The People, ex rel. City of Chicago v. The Chicago Telephone Co.*, 220 Ill. 238. The court says, page 248:

"The ground of defendant's claim that the ordinance (Chicago) does not limit its charges in the annexed territory is that before the annexation the minor municipalities had granted to it the right to occupy the streets therein for its business without any limit as to time. * * * Such grants cannot be construed to be perpetual and at most cannot extend beyond the lives of the corporations granting them. * * * The ordinances of the city extended over the annexed territory immediately upon annexation (*Illinois Central Railroad Co. v. City of Chicago*, 176 U. S. 646), and the limitations of the ordinance applied in the annexed territory. The question in this case is the same as the one involved in the case of *Indiana Railway Co. v. Hoffman*, 160 Ind. 601 (69 N. E. Rep. 399) where it was held that a provision for transfers applied to the territory annexed to the city after the contract was made, and on an interurban line on which the defendant had been entitled to charge an additional fare before the annexation of the territory."

See also *People v. Central Union Tel. Co.* 232 Ill. 260.

People ex rel. Rockwell v. Chicago Telephone Co., 245 Ill. 121.

City of Sullivan v. Central Illinois Pub. Ser. Co., 287 Ill. 19.

Not only is it the settled law of Illinois that an indeterminate or perpetual franchise to use the streets for telephone purposes terminates upon the annexation of the municipality granting it, but as a general rule a grant of franchise which contains no specific limitation as to duration is subject to the general law limiting such duration.

Owensboro v. Cumberland Tel. etc., Co., 230 U. S. 58, 33 Sup. Ct. 988, 57 L. Ed. 1389.

Boise City Artesian, etc., Water Co. v. Boise City, 123 Fed. 232, 59 C. C. A. 226.

Postal Tel. Cable Co. v. Ingraham, 228 Fed. 392.

People ex rel. Pearce, State's Atty. v. The Commercial Tel. and Tel. Co., 277 Ill. 265.

But if any franchise right may be held to have survived the annexation of the Village of Jefferson and the Town of Lake to the City of Chicago, such rights have been lost to the American Telephone and Telegraph Company through the reputed facts that after such annexation the Company ceased to operate under the ordinance grants, sold the property necessary to the exercise of the franchise, and now "has no lines in the streets of the city." This would constitute abandonment.

New York Electric Lines Co. v. Empire City Subway Co., 235 U. S. 179, 35 Sup. Ct. 72, 59 L. Ed. 184.

Thompson v. Schenectady R. Co., 124 Fed. 274.

State v. East Fifth St. R. Co., 140 (Mo.) 539, 41. S. W. 955, 38 L. R. A. 218.

Furthermore, the American Telephone and Telegraph Company makes an admission, which, in its nature, is conclusive of the fact of its abandonment of its rights under the minor municipality ordinances, by its own written proposal to the Chicago Telephone Company for "an arrangement which leaves in the Chicago Telephone Company the ownership of all the plant, consisting of poles, wires, conduits, cables and fixtures used in the long line business within the present city limits," and creating by acceptance of its proposal an "arrangement" under which, ostensibly, the American Telephone and Telegraph Company thereafter operates in the City of Chicago, exclusively in right of the Chicago Telephone Company's franchise and ordinances.

Nor could the rights of the American Telephone and Telegraph Company under the ordinances of the Town of Lake and Village of Jefferson enure to the benefit of the Chi-

cago Telephone Company by reason of the latter company's purchase of the American Company's property. Even if these ordinances were not terminated by annexation, and not lost by abandonment, any possible rights thereunder were expressly waived by the Chicago Telephone Company by the provisions and acceptance of the ordinance of November 6, 1907. The future construction, maintenance and operation of the Chicago Telephone Company's system were restricted to the provisions of this ordinance, the company was required to file its written acceptance of this ordinance "together with a written surrender and waiver by said company of any right or privilege to thereafter construct, erect or maintain its conduits, cables, poles, wires or conductors within the City of Chicago, under or by virtue of any ordinance, grant or license from the City of Chicago, or from any of the municipal corporations within any territory which now is or may hereafter be embraced within the limits of the City of Chicago."

Special Ordinances of Chicago, Hoover, 1915, Sec. 15, p. 1842.

V.

THE GENERAL LAW GOVERNING THE RIGHTS AND OBLIGATIONS OF TELEPHONE AND TELEGRAPH COMPANIES IN THE CITY OF CHICAGO.

Sec. 1 of An Act to revise the law in relation to telegraph companies (approved March 24, 1874), Smith & Hurd R. S., 1923, Ch. 134, p. 2076, provides:

"That every company heretofore incorporated under any general or special law, or which may be incorporated under any general law of this State for the construction or operation of any telegraph line through or in this State, shall possess the powers and privileges and be subject to the duties, restrictions and liabilities prescribed in this act."

Section 2 provides for the exercise of eminent domain; Sec. 3 for compensation to be paid for private property taken or damaged.

Sec. 4 is important in that it provides that the consent of the municipality shall be a condition precedent to the company's right to construct its lines. The section is as follows:

"No such company shall have the right to erect any poles, posts, piers, abutments, wires or other fixtures of their lines along or upon any road, highway or public ground, outside the corporate limits of a city, town or village, without the consent of the county board of the county in which such road, highway or public ground is situated, nor upon any street, alley, or other highway or public ground, within any incorporated city, town or village, without the consent of the corporate authorities of such city, town or village. The consent herein required must be in writing, and shall be recorded in the recorder's office of the county. And such county board, or the city council, or the board of trustees of such city, town or village, as the case may be, shall have power to direct any alteration in the location or erection of any such poles, posts, piers, abutments and also in the height of the wires, having first given the company or the agent opportunity to be heard in regard to such alteration."

The foregoing act, although referring in terms only to telegraph companies, was held by the Supreme Court of Illinois, as were similar Acts by the courts of other jurisdictions, to embrace telephone companies.

Village of London Mills v. White, 208 Ill. 289.

People ex rel. v. Central Union Tel. Co., 232 Ill. 260.
37 Cyc. 1609 B2 and 1626 A2.

An Act relating to the powers, duties and property of telephone companies was enacted and approved May 16, 1903. Smith & Hurd R. S., 1923, Ch. 134, p. 2078; Cahill, R. S., 1923, sec. 15, p. 3312. Sec. 1 of the Telephone Act provides:

"That each corporation heretofore or hereafter having power under its charter, or under any general or special law of the State of Illinois to construct or operate telephone lines or exchanges in or through Illinois, shall possess the powers and privileges and be subject to the duties, restrictions and liabilities prescribed in this act."

Sec. 2 provides that "the fines, penalties, judgments and punishment provided in such acts applicable to telegraph companies or their lines or property," shall likewise apply to telephone lines.

Sec. 3 provides the method of installation of wires over steam and electric railroads.

Sec. 4 confers the power of eminent domain with directions that it be exercised in accordance with the provisions of the Telegraph Act of March 24, 1874, and then authorizes every telephone company "to construct, maintain, alter and extend its poles, wires, cables and other appliances as a proper use of highways, along, upon, under and across any highway, street, alley, water or public ground in this State, but so as not to incommode the public in the use thereof: *Provided, that nothing in this act shall interfere with the control now vested in the cities, incorporated towns and villages in relation to the regulation of the poles, wires, cables and other appliances.*" The remainder of said section provides that notice shall be given "the highway commissioners having jurisdiction and control of the road" of the company's intention to construct its line, and provides for the construction thereof according to their official direction.

Sec. 5 relates to the method and effect of mortgaging the company's property.

The Act of May 16, 1903, although referring in terms only to telephone companies, obviously was enacted in view of and as supplementary to the Telegraph Act of March 24, 1874. The Telephone Act confers the power of eminent domain but provides explicitly that such power shall be exercised in conformity to the provisions of the Telegraph Act. The Telephone Act prescribes as penalties for injuring telephone property such as are by the Telegraph Act made applicable to telegraph lines. The Telegraph Act provides that no telegraph company shall construct its lines "without the consent of the corporate authorities of such city, town or village," which provision had been held by the Supreme Court to embrace telephone companies. And the legislature ex-

pressly provided in the Telephone Act, that nothing in this act shall interfere with the control and regulation of telephone companies as now vested in the city.

However, in a controversy between the City of Moline and the Central Telephone Company, the contention was made that the Telephone Act constitutes a grant by the State to telephone companies of the right to use the public streets and alleys of towns, cities and villages without municipal consent, for their poles, wires and fixtures, subject only to reasonable police regulations. In fact this was the theory of a plea of the telephone company to an information in the nature of *quo warranto* filed by the city in the case of *The People ex rel. City Attorney v. The Central Union Telephone Co.*, 232 Ill. 260. The court held against the contention, carrying the telephone company's demurrer to the replication back and sustaining it to this plea. The court, in disposing of this contention and in construing the Telephone Act, said (p. 277) :

"That act, however, gives no authority to a telephone corporation to set poles or string wires in the street of any incorporated city, town or village without the consent of the corporate authorities. The act is designed to extend the charter powers of telephone companies by investing them with the power of eminent domain, and to declare that the construction and maintenance of telephone lines is a proper use of a highway, and to authorize the construction and maintenance of telephone lines along, upon, under and across any highway, alley, water or public ground, provided the public are not incommoded. The act, however, expressly provides that nothing in it shall interfere with the control vested in cities, incorporated towns and villages in relation to the regulation of the poles, wires, cables and other appliances. That control is not limited to prescribing the location and size of the poles, and such matters, but extends to the whole subject. There is no provision for giving notice to the city of the intention to construct a line, with the privilege to the city of specifying the portion of the street on which the line shall be placed, as there is in the case of the highway commissioners. The whole matter of control by municipalities remains where

it was before the act was passed. The facts alleged in the second plea constituted no justification for the occupation of the streets and the plea was bad."

Telephone companies and telegraph companies perform same public service.

Pub. Util. Co. v. Postal Tel. Co., 285 Ill. 411.

It was clearly the intention of the Legislature in the enactment of the Telephone Act to leave the telephone companies subject also to the Telegraph Act of 1874. Construed by the court to embrace telephone companies, the Telegraph Act is in *pari materia* with the Telephone Act, and under the familiar principle of statutory construction, the two acts should be construed together in determining the rights and privileges of the companies as well as the powers and duties of the municipalities.

By the foregoing general laws of Illinois the American Telephone and Telegraph Company is authorized to construct and maintain its lines upon or along the public roads, streets and highways of the State, and this is so although as a telephone company it is not entitled to the benefits of the 1866 Post Roads Act of Congress, conferring like authority.

Richmond v. Southern Bell Tel. Co., 174 U. S. 761,
19 Sup. Ct. 778, 43 L. Ed. 1162.

But where, as in Illinois, such right is made conditional upon obtaining the consent of the local authorities, the municipality may exclude such corporations from its streets for failure to secure such consent.

People ex rel. City Atty. v. Central Union Telephone Co., 232 Ill. 260.

Springfield v. Postal Telegraph-Cable Co., 253 Ill. 346.

Northwestern Tel. Exch. Co. v. City of St. Charles,
154 Fed. 386.

Southern Bell Tel. Co. v. City of Richmond, 103 Fed. 31.

Cumberland Tel. & Tel. Co. v. City of Evansville,
127 Fed. 195, affirmed 143 Fed. 238.

It has been held that a telephone or telegraph company is a trespasser and the presence of its poles and wires in the streets constitutes a nuisance, where municipal consent is necessary for the occupancy of the streets but is not obtained by the company.

East Tenn. Tel. Co. v. Russellville, 51 S. W. 308,
21 Ky. L. Rep. 305.

Bland v. Cumberland Tel., etc., Co., 109 S. W. 1180.
33 Ky. L. Rep. 399.

V I.

WHAT STATUS AND RIGHT HAS THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY IN THE CITY OF CHICAGO BY VIRTUE OF THE ORDINANCE OF NOVEMBER 6, 1907, WHICH GRANTS TO THE CHICAGO TELEPHONE COMPANY THE RIGHT TO ESTABLISH AND MAINTAIN A TELEPHONE SYSTEM IN THIS CITY?

The correspondence between these two companies, which is set out in our statement of facts, clearly demonstrates two propositions. First, that from and after June, 1889, when the ordinance grants of the Towns of Lake and Jefferson to the American Telephone and Telegraph Company terminated by annexation of said towns to the City, to 1911 and 1913, the time when said correspondence was had for the admitted purpose of "meeting the question recently raised by the city as to the right of the A. T. & T. Company to operate in the City of Chicago," the American Telephone and Telegraph Company constructed and maintained its system of telephone poles and wires in the streets of Chicago and conducted its telephone business in the city in violation of the state laws and the rights of the municipality, paying no compensation whatever for the use of the City's streets and no license fees for its police regulation. Second, that since said correspondence in 1911 to 1913, the American Telephone and Telegraph Company is relying wholly upon its purported agreement with the Chicago Telephone Company and the latter company's rights under the Ordinance of November 6, 1907, for

the legality of its continued occupancy of the city's streets and the continuance of its telephone operations in the city without franchise, license, or permit from the city therefor.

It is quite apparent that the sole purpose of this purported agreement between the two companies was to enable the American Telephone and Telegraph Company to cover up its confessedly illegal status, to continue the evasion of its legal duty to obtain the consent of the City of Chicago by ordinance grant of authority to operate in the city, and to further avoid payment to the city of any measure of compensation for the use of the City's streets and any fees for the police protection and regulation afforded it. We are of the opinion, however, that said agreement is invalid for the purpose, and that the Chicago Telephone Company was powerless, under the ordinance of November 6, 1907, to render any legal aid to the American Telephone and Telegraph Company in the attempted accomplishment of such purpose.

VII.

THE ORDINANCE OF NOVEMBER 6, 1907, GRANTED PERMISSION AND AUTHORITY TO THE CHICAGO TELEPHONE COMPANY TO CONSTRUCT, MAINTAIN AND OPERATE A LOCAL TELEPHONE EXCHANGE SYSTEM IN AND FOR THE CITY OF CHICAGO; AND THAT ORDINANCE CANNOT BE SO CONSTRUED AS TO AUTHORIZE THE CONSTRUCTION OR PURCHASE AND OPERATION IN WHOLE OR IN PART OF ANY LONG DISTANCE TELEPHONE SYSTEM OR LINE.

The rule that franchise grants, whether by statute or ordinance, are strictly construed against the grantee is elemental and needs no citation of authorities. There is a vital distinction between a Long Distance Telephone Line and a Local Telephone Exchange, which is generally recognized by the courts, and a license for one will not authorize the other.

Home Tel. Co. v. New Brunswick, 62 N. J. L. 172.

Northwestern Tel. Exch. Co. v. City of St. Charles, 154 Fed. 386.

State ex rel. Northwestern Tel. Exch. Co. v. City of Thief River Falls, 102 Minn. 425; 113 N. W. 1357.

See, also :

City of Toledo v. Western Union Tel. Co. (C. C. A.), 107 Fed. 10.

City of Mitchell v. Dakota Central Tel. Co., 25 S. Dak. 409.

City of Mitchell v. Dakota Central Tel. Co., 246 U. S. 396.

In the case of *Home Telephone Co. v. New Brunswick*, *supra*, the telephone company presented to the city council its formal petition for an ordinance designating certain named streets for its system of poles and wires. The petition was refused and mandamus instituted against the city council. The writ was denied on the ground that the petition must be construed as one for a local telephone exchange, while the general telephone act made mandatory upon the cities and towns only the granting of the right to construct a "through" line, a long distance telephone line. The Supreme Court of New Jersey says (p. 175) :

"The reason for such a distinction between through lines and local systems is readily perceived. The former are chiefly for the benefit of persons outside of the municipality to be traversed, who have not committed their interests to the local boards, and hence the legislature has rightly refused to vest in those boards control over such interests, but with respect to local systems, which concern wholly or mainly the inhabitants of the municipality, the discretion of the local government, which those inhabitants have chosen, is properly made paramount."

In the case of *Northwestern Tel. Exch. Co. v. City of St. Charles*, *supra*, it appears that the Telephone Company, by virtue of an ordinance grant, had constructed and maintained its long distance system in the City of St. Charles for a period of ten years, during the greater part of which time it maintained connection with the local telephone ex-

changes of the People's Telephone Company. At the expiration of its contract with the local company the Northwestern Tel. Exch. Co. "disconnected its wires from the exchange of that company and applied to the city council * * * for permission to erect poles and wires upon several of the streets and alleys in the city and to establish a local telephone exchange in the city, which would be connected with its long distance lines." The city refused to grant this permission, and the only permission the company had to place poles and wires in the streets was that granted in 1895 for its long distance lines which it erected in certain streets named in the grant. The City of St. Charles had passed a penal ordinance against the erection by any person or corporation of "any telephone, telegraph, electric light or power poles of any sort" unless authorized by ordinance or resolution duly passed and adopted by the city council. In disposing of the case the court said (p. 390):

"It is to restrain the city council from enforcing this ordinance that this suit is brought. As the city council has, under the charter of the city, the control, supervision and management of the streets and alleys of the city, it seems to me that it is proper, and within the power of the city council, to pass an ordinance of this kind and to enforce it in the manner provided in the ordinance. It seems to me that it does not affect any rights of the complainant company, because it does not apply to any case where the occupation of the streets or alleys has been authorized by ordinance or resolution duly passed and adopted by the city council, and therefore it would not apply to the long distance telephone line complainant is now using, and which, so far as appears in this case, is all that the complainant company has a right to construct."

The case of *State ex rel. Northwestern Telephone Exchange Company v. City of Thief River Falls, supra*, involved the construction of the following city ordinance (p. 421):

"Resolved, by the City Council of the City of Thief River Falls, that the right, privilege, and authority is hereby granted to the Northwestern Telephone Exchange Company, its successors and assigns, to occupy the streets,

alleys, and public grounds within said city for the purpose of placing therein its poles, wires and fixtures, constituting its telephone and telegraph line within and through said city, provided that the location of said poles and wires and fixtures shall be designated by said city council."

The telephone company brought action for mandamus against the city, setting forth in its petition the foregoing ordinance, its passage by the city council March 20, 1899, the designation by the city council pursuant to the ordinance of certain streets for the poles and wires, and the construction and operation by the company of its "telephone line" in the city. The company further alleged that it had presented to the city council in June, 1906, its petition for an extension of its lines and "demanded of the common council that it so designate the location, or streets, alleys and grounds, where the petitioner might place its poles, wires and fixtures in making the proposed extension. That the petition was in all respects declined and refused, on the ground that respondent city was about to install and purchase a telephone system of its own, and for the further reason that relator had no right upon any of the streets, alleys, or public grounds of the city, except those actually occupied by it."

The city by way of answer to the alternative writ admitted the passage of the ordinance in question and the subsequent passing of the resolution designating the streets to be used by relator, and then set out *in haec verba* this resolution of August 21st, which particularly described the streets "as the route over which the Northwestern Telephone Company is permitted to place its poles and wires." And, to use the language of the Supreme Court of Minnesota:

"The answer further alleged that the resolution of August 21st defined and limited the extent of appellant's lines and its rights in the city, and that it had not at any time before the commencement of this proceeding used such line for any other than long distance business. The answer also states that there was already an adequate and complete telephone exchange in operation in the city, and that there was no necessity or demand

for increased facilities in connection with the petitioner's telephone service, and that it would be a burden to the inhabitants of the city to permit such additional incumbrance on the city streets."

To this answer the relator filed demurrer on the ground of insufficient facts. The court overruled the demurrer and denied the writ, and the relator, telephone company, appealed. The Supreme Court affirmed the decision of the lower court and said:

"The answer admitted that the city was already possessed of adequate telephone facilities, and alleged that there was no necessity for an extension of appellant's system; but the question of the legal right to do so was fairly raised by the pleadings, and consequently we have presented for decision in this court the single question: Did appellant acquire the right to establish a local telephone system under and by virtue of the resolutions of March 20th and August 21st, 1899?"

"It is elementary," says the court, "that the proper rule of construction of municipal ordinances is that they shall be strictly construed against the party claiming a grant. The language of the resolution is: 'To occupy the streets, alleys, and public grounds within said city for the purpose of placing therein its poles, wires, and fixtures, constituting its telephone and telegraph line within and through said city.' * * * Strictly speaking, 'its telephone line' refers to the line the company was at that time constructing through the country, viz., its long distance telephone line. If, however, the language of the resolution is ambiguous, or susceptible of two constructions, one as contended for by appellant and the other by the city, then the subject should be considered in the light of the surrounding circumstances in order to determine the intention of the parties."

After considering the allegations of the petition and the circumstances attending the passage of the ordinance and the construction of the company's telephone system, the court concludes as follows:

"Therefore appellant was primarily engaged in the business of conducting a long distance system in this and other states, and only established local exchanges in com-

paratively few instances. It was not the intention of the company to install a local telephone exchange in the city at the time it made application for the grant. It made no attempt to do so after the passage of the resolution of March 20th, but, on the contrary, took the necessary steps to extend its long distance system to the city, and made no demand upon the council to locate a route for a local exchange until the period of nearly seven years had transpired, and until the location of another system and the growth of the city made it apparent that it might be profitable."

The court then observes that if it was the intention of the company to locate a long distance system only it is reasonable to suppose that the city council passed the ordinance with reference to the long distance system only, and continues:

"While the action of the council in locating the line by the resolution of August 21st was not inconsistent with an unlimited grant, such action was consistent with a limited grant; and unless it clearly appears from both resolutions, when considered in view of the surrounding circumstances, that the grant was unlimited, no presumption to that effect arises from the mere fact that express words of limitation were not employed.

"In addition to what appears from the pleadings, it may be stated that *it is a matter of common knowledge that the telephone business has always consisted of two well-defined branches—the long-distance system, and the exchanges for the local business of cities and villages*, long distance companies have often acquired local exchanges, and, in the larger cities, operated them in connection with the toll system; but the words, 'telephone line' do not necessarily include local exchange lines. Appellant was engaged particularly in the long-distance telephone business. Presumably respondent (City Council) treated with the company in that capacity, and the language of the grant does not require the construction which would indicate that as representatives of the municipality the members of the council were careless trustees and intended to tie the hands of the city for all time with reference to a very important franchise."

The last three cases cited clearly establish the material distinction between a long-distance telephone system and a

local telephone exchange system, and sustain the proposition that an ordinance grant to construct and operate one system will not authorize the construction and maintenance of the other. The New Jersey court points out that the long-distance system is "chiefly for the benefit of persons outside the municipality" while the local telephone exchange systems "concern wholly or mainly the inhabitants of the municipality," and that mandamus to permit the construction of a long-distance telephone system would not lie to coerce permission to construct a local telephone exchange. In the *Northwestern Tel. Exch. Co.-St. Charles* case the Federal court held that the telephone company was not entitled to enjoin the enforcement of the City's penal ordinance against the erection of poles without the city's consent, to enable the company to extend its present system into a local telephone exchange, because, under the city's grant to the company, the long-distance telephone line "is all the complainant company has any right to construct." In the Minnesota case the Supreme Court construed an ordinance which was so general in its terms that the telephone company contended it authorized the extension of its lines to include a local telephone exchange. But the court held, in view of the particular streets designated for the line, the company's use of such streets for seven years for a long-distance telephone only, and the recognition of the distinction between the two classes of telephone systems, that the grant must be limited to the construction of a long-distance system.

We have quoted at some length from the opinion of the Minnesota Supreme Court because it affords a practical and judicial construction of a telephone ordinance grant that may well be applied to the construction of the Chicago Telephone Company Ordinance of November 6, 1907. Unlike the ordinance in the Minnesota case the Chicago ordinance is specific and admits of no doubt that the only grant made and accepted was the privilege and authority to construct and maintain a local telephone exchange in and for the City of Chicago. This is established also by the practical construction put upon the ordinance by the two telephone companies them-

selves, the Chicago Telephone Company and the American Telephone and Telegraph Company, acting respectively in the capacities of a local telephone exchange and a long-distance telephone system. For years the American Telephone and Telegraph Company maintained connection with the Chicago Telephone Company's local exchange for the reception and transmission of its long-distance messages brought into the city over its own long-distance lines; and this service constitutes the extent to which local telephone exchanges as such may legally go in their participation in the long-line telephone business. And this is all that is authorized or contemplated by Section 3 of the Ordinance of November 6, 1907, which merely provides what compensation shall be paid to the City by the local company and enumerates, as one item of receipts upon which such compensation shall be based, all moneys received "of any other company or person outside of said City of Chicago (commonly known and designated as 'long-distance' service, communication or messages)." (Hoover, 1915, Special Ordinances of Chicago, page 1826, Sec. 3.) Neither this section nor the ordinance itself, which must be construed as an entirety, confers any right on the Chicago Telephone Company to construct, own or operate, in whole or in part a long-distance telephone system, either for itself or for any long-distance telephone company. Certain it is that such ordinance does not empower the Chicago Telephone Company to purchase and operate that part of the American Telephone and Telegraph Company's telephone system, which was projected into the city without leave or license in any form and which, therefore, illegally occupied the city's streets, alleys and public grounds.

In *City of Mitchell v. Dakota Central Telephone Co.*, 246 U. S. 396 (cited above), it appears that on May 11, 1898, the city granted the right by ordinance, No. 135, to use its streets and alleys for "a public telephone system," and under this grant a local telephone system was installed and operated till 1904. In 1904 the city granted to another company by ordinance, No. 174, the right to construct and operate long-distance lines within and through the city.

“for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long-distance telephone or other electrical devices with parties residing near or at a distance from Mitchell.”

This ordinance proved insufficient, and three months after its passage a new ordinance, No. 180, was passed (both passed in 1904). The latter ordinance amended Section 1 of the other so as to enable communication

“with parties residing *in*, near or at a distance from Mitchell.”

The word in italics was the amendment, and the word “lines” in Ordinance No. 174 was changed to the word “system” in Ordinance No. 180.

Other “Toll lines” had been licensed and operating in the city. By mesne transfers the Dakota Central Telephone Co. in October, 1904, became the sole owner of all the telephone rights in the City of Mitchell theretofore granted by the various ordinances.

Thereafter, April 10, 1907, to install a telephone system known as the “Automatic” and to make other permanent improvements, the company applied for and obtained the passage of the following resolution:

“Be it resolved, by the City Council of the City of Mitchell, South Dakota, that the right is hereby granted to the Dakota Central Telephone Company, their successors or assigns, to place, construct and maintain through and under the streets and alleys and public grounds of said city all conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the public in general communication by telephone and other improved appliances.”

The telephone company later contended that Ordinance No. 180 and this resolution authorized both local and long distance telephone systems. But the City of Mitchell, assuming that the expiration of Ordinance No. 135 of May 11, 1898, would terminate the Dakota Central Telephone Company's rights in the city as a local telephone exchange did, on March 17, 1913, notify the company to remove its poles,

wires, etc., constituting its local telephone exchange or system, and that if it failed to do so, the city would cause them to be removed.

The telephone company filed its bill in the Federal District Court of South Dakota to restrain the city from taking this threatened action on the alleged ground that the resolution of March 17, 1913, is unconstitutional as impairing the obligations of existing contract, as taking property without due process of law, and as constituting a wrongful interference with interstate commerce.

The District Court granted the injunction and the city appealed. In reversing the decree the United States Supreme Court, by Justice McKenna, said (p. 408):

“The case centers upon the ordinance (180). The telephone company contends that it gives the company the right to operate not merely long-distance lines, but a local telephone exchange within the city. In other words the contention is that it superseded ordinance No. 135 and became a new source of right, a right both of long-distance and local exchange. The city opposes this construction and insists that the ordinance confers only the right to maintain a long-distance system; that the right to a local exchange was given by ordinance No. 135 and expires with the expiration of that ordinance, May, 1913. And the city urges that its characterization of ordinance 180 was sustained by the Supreme Court of the State in *City of Mitchell v. Dakota Central Telephone Co.* (25 S. Dak. 409).”

Speaking of this state court decision, Justice McKenna said:

“It was brought by the city against the company to recover a certain percentage of the gross receipts of the company, provided to be paid by Section 4 of ordinance No. 135. One of the defenses of the company was that that ordinance was in effect repealed and superseded by ordinance No. 180. * * * The court, in answer to the contention of the company, held that ordinance No. 180 did not have the effect of repealing, qualifying, or modifying ordinance No. 135. * * * There is clearly, no inconsistency between the two ordinances; one being for a local city telephone system, and the other being for a long distance telephone system.”

Continuing, Justice McKenna said:

"Stress is put upon the words 'system,' 'within,' 'through,' 'in' and 'near,' and it is insisted that they were necessarily intended to accommodate the residents of the city and to give them facilities of local and long-distance telephone service and that something more was intended than to grant a mere right to carry long distance telephone wires through the city.

The contention has its strength and persuaded the District Court, but it is countervailed by other considerations. Undoubtedly the inducement of ordinances Nos. 174 and 180 was to give to residents of the city long distance telephone facilities, but it cannot be said that granting such right inevitably or even naturally repealed or superseded the right to operate a local system which was given and then existed under ordinance No. 135, and which then had nine years to run. Besides, the decision of the Supreme Court is a factor of controlling strength. It explicitly decided that ordinances 135 and 180 had distinct purpose and operation and that the latter did not repeal or supersede the former. The issue was tendered by the company and the decision upon it is conclusive against the company. * * *

The views of the State court, moreover, have the support of principles declared by this court, that grants of rights and privileges by the State or of any of its municipalities are strictly construed 'and whatever is not unequivocally granted is withheld; nothing passes by mere implication.' *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 34; *Blair v. Chicago*, 201 U. S. 400, 471.

The contentions of the company in the case at bar rest entirely upon implication, the implication of a repeal of one ordinance by another, which is never favored, though the ordinances expressed different purposes and could and did co-exist for such purposes. * * *"

The decision sustained the right of the City of Mitchell to remove from the city "all of the company's poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system," and reversed the decree of the United States District Court enjoining the exercise of such right.

It is worthy of note here, that every right contended for by the Dakota Central Telephone Company was based on ordinances or resolutions of the city council, for which application to the council was always consistently made by the company, and yet the company was held to a strict construction of these ordinances and resolutions for its rights, and was held to have lost its right to continue operation of its local telephone exchanges because of the expiration of one of its ordinance grants, and held not to be entitled to injunctive relief against the city's threatened removal of its local telephone exchange from the city. The American Telephone and Telegraph Company in all its thirty-four years of operations in the City of Chicago, has not a single ordinance or resolution upon which to base a solitary legal contention of right to construct or operate a telephone system in the city; and the Chicago Telephone Company, or its assignee, the Illinois Bell Telephone Company, also has no ordinance or resolution of any kind to authorize its maintenance and operation of a long-distance telephone system in the City of Chicago; and such company wantonly violates the Ordinance of November 6, 1907, granting to it the right to construct and operate a local telephone exchange, by its attempt to foist upon the City of Chicago the additional servitude of a long-distance telephone system, to be operated either for itself or for the American Telephone and Telegraph Company, which has persistently evaded the police powers of the State and even refused to recognize

“that under the constitution of the State the city had the right to grant or withhold its consent to the use of its streets, and necessarily had the right to grant the same upon such terms and conditions as it might choose to impose.” (Justice McKenna, in *City of Mitchell v. Dakota Central Telephone Co.*, *supra*.)

The general terms of the grant to the Chicago Telephone Company, as contained alone in Section 1 of the Ordinance of November 6, 1907, might be cited by the telephone companies. Section 1 reads as follows:

“Be it ordained by the City Council of Chicago:
Sec. 1. That permission and authority are hereby granted

to Chicago Telephone Company, a corporation created and existing under and by virtue of the laws of Illinois, upon the terms and subject to the conditions of this ordinance, to construct, maintain, repair and operate in and under the public streets, alleys and other public ways of the City of Chicago and under the Chicago River and its several branches, until January 8, 1929, its system of wires, cables, electrical conductors, poles and conduits for the transmission of sound and signals only, by means of electricity."

Special Ordinances, Hoover, 1915, p. 1825.

This section, standing alone, is not as general in terms as the ordinance grants in the cases just considered, *supra*, namely: *Northwestern Tel. Exchange Co. v. City of St. Charles*; *State ex rel. Northwestern Tel. Exchange Co. v. City of Thief River Falls*; *City of Mitchell v. Dakota Central Tel. Co.*

Despite the contention made in those cases that the general language of the grant was sufficient to authorize the construction and operation of both local telephone exchanges and long-distance system, the courts held the ordinances limited the authority granted to the operation of a local exchange or long-distance system and not both.

No rule of statutory construction is more firmly established than that which requires an instrument to be construed as a whole, which precludes taking a separate part of a statute, ordinance or contract or an isolated provision and by placing a construction on that alone, ascertain the intention and purpose of the instrument. Furthermore, Section 1 of Ordinance November 6, 1907, expressly provides that the grant is made "upon the terms and subject to the conditions of this ordinance." The ordinance provides in detail for a local telephone exchange, and contains nothing indicating a thought by the City Council of granting authority for a long-distance telephone system, except section 3, which has to do solely with the subject-matter of compensation to be paid to city by the Chicago Telephone Company as a local telephone exchange and which, as already referred to, gives no color to a contention for a long-distance telephone grant. The ordi-

nance provisions for rates to be charged apply to every kind of local telephone service, and have no application whatever to the long distance telephone service.

Moreover, the practical construction put upon the ordinance by both telephone companies, as already considered, absolutely precludes the Chicago Telephone Company, after years of operation exclusively as a local telephone exchange, from contending for the right to own and operate a long-distance telephone system *in Chicago*, especially that part of the long-distance plant of the American Telephone and Telegraph Company, for the obvious purpose of enabling that company to continue its evasion of the city's power over its streets and its right to compensation for their use.

No principle of law is better settled than that corporate privileges, which are not ordinarily and necessarily an incident to the corporate franchise, can be held to prevail over public rights only when it plainly and explicitly appears that such privileges have been, in fact, granted.

Simons Brick Co. et al. v. City of Los Angeles, 187 Pac. 1066.

Helena Water Works Co. v. Helena, 125 U. S. 383; 25 Sup. Ct. 240; 49 L. Ed. 245.

Indianapolis City Ry. Co. v. Citizens Street Ry. Co., 127 Ind. 369; 24 N. E. 1054; 26 N. E. 893; 8 L. R. A. 539.

Capital City Light Elec. Co. v. City of Tallahassee (Fla.), 28 South. 810.

VIII.

ONE COMPANY UNDER THE GRANT OF THE RIGHT TO USE STREETS CANNOT UNDER ITS FRANCHISE CONFER A SIMILAR RIGHT UPON A SEPARATE AND DISTINCT COMPANY WITHOUT THE CONSENT OF THE MUNICIPALITY.

37 Cyc. 1613, D 2, p. 1616.

Western Union Tel. Co. v. City of Toledo ex rel., 103 Fed. 746.

City of Toledo v. Western Union Tel. Co., 107 Fed. 10.

City of Aurora v. Elgin Traction Co., 227 Ill. 485.

Hauss Electric Lighting Power Co. v. Jones Prov. Electric Co., 10 Ohio Dec. (Reprint) 709; 23 Cine. L. Bul.; 137 (Taft. J.).

The United States District Court's opinion in *Western Union Telegraph Company v. City of Toledo*, *supra*, takes but one page for its report, and so tersely presents the facts, the issues, the law and the decision that we prefer to quote it in full, rather than to attempt to paraphrase it and draw our own deductions. The court says:

"This cause was submitted on an application for a temporary injunction. The gist of the complaint, found in Paragraph 10 of the bill is that:

'The City of Toledo, through its common council and its various officers, particularly the defendant officers here impleaded, threatens to cut the wires, destroy the lines, and remove the poles of your orator from districts and localities not covered by the underground ordinance and in places and localities which do not and cannot by any possibility interfere with the ordinary travel upon the streets and alleys of said City of Toledo, and without designating any place or locality, other than the places now occupied, to which your orator shall remove these lines and poles; and your orator avers and shows unto Your Honors that said City of Toledo, its common council, and officers aforesaid, will, unless restrained by order of this honorable court, destroy the property of your orator, interrupt the working of its lines, disorganize and ruin its business, and incapacitate it from discharging its duties to the public and its agency to the federal government.

The affidavit of Charles O. Brigham, filed in support of the application, shows that the City of Toledo revoked the permits for 'outside construction of any kind' which had theretofore been granted the complainant, and that by 'outside construction of any kind' complainant understood that the entire City of Toledo was included. *The affidavits of the defendants show that the City of Toledo found that the National District Telegraph Company was using the permits granted to the complainant*

to construct for operation a system of local messenger call boxes, and thereupon revoked the permits; and afterwards, on the 5th of April, 1900, the common council of the City of Toledo passed an ordinance directing the chief of police, the civil engineer and the superintendent of the fire-alarm telegraph to remove forthwith from the streets, alleys, and public places of the City of Toledo the wires, fixtures and poles erected or constructed by the National District Telegraph Company. The defendants disclaim any intention to cut, remove, or destroy any of the wires, poles, or other property of the complainant, but insist upon their right to remove the property of the National District Telegraph Company, because it has not complied with the laws of the State of Ohio, nor with the ordinances and regulations of the City of Toledo governing the placing of wires and poles in the city. The rebutting affidavits of the complainant state that every pole set and every wire strung on any of said poles under permits issued complainant was and is the property of the complainant, and that no other person or corporation under said permits erected poles or strung wires thereon.

It clearly appears from the affidavits that the permits granted to the complainant contemplated work to be done in furtherance of the ordinary business of the complainant, but did not contemplate that any other company or corporation under cover of these permits would use the franchise of the complainant to establish and carry on a purely local business. Upon the case presented by the affidavits there would seem to be an abuse of the privilege granted the complainant sufficient to justify the revocation of the permits. The complainant, under its franchise, could not confer upon a separate and distinct company or corporation the right to use the streets and alleys of the City of Toledo without its consent. The ordinance referred to was directed against the National District Telegraph Company and its attempted use of the streets and alleys of the City of Toledo without its consent and not against the complainant, and there is no proof to sustain the allegations of the bill that the defendants seek to remove or destroy the property of the complainant. The application for an injunction therefore is refused, and the preliminary restraining order heretofore issued will be vacated."

The Western Union Telegraph Co. subsequently filed another petition in this case and secured a restraining order from which an appeal was taken by the city. The Circuit Court of Appeals, in that case, *City of Toledo v. Western Union Telegraph Co.*, *supra*, decided, "That the order for a preliminary injunction was improvidently made and must be reversed." The report of the case on appeal sets out at considerable length the facts and history of the case. From this it appears that after

"the preliminary injunction was denied and the temporary restraining order vacated (*W. U. Tel. Co. v. City of Toledo*, 103 Fed. 746), the complainant then filed a petition setting out frankly its purpose of installing a district telegraph system in the City of Toledo in connection with its business as now conducted. * * * After a hearing, an order was made reciting that the complainant proposed to establish and operate a local district telegraph system in the City of Toledo, through its own wires and apparatus, and restraining the defendant, until the further order of the court, from obstructing the complainant in installing the system on its poles and through its conduits, and from interfering with the complainant in carrying on and conducting a district telegraph system within the City of Toledo."

On appeal of the case by the City of Toledo the Western Union Telegraph Company made the claim that it was empowered by the Post Roads Act of Congress, 1866, to occupy with its wires and poles the streets of Toledo as post roads of the United States. The United States Circuit Court, in its decision reversing the injunction decree of the District Court, said:

"We think, however, in the use of these streets and alleys, although it had accepted the terms of the statute of 1866, the complainant was subject to the control of the municipality, and could not, in defiance of its reasonable regulations, erect poles and stretch wires without let or hindrance."

And the court continuing, said:

"We think the complainant should have made the usual application for permits to string its wires, stating

exactly what was required, in accordance with the regulations of the city, with which it had been accustomed to comply, and it had no right to construct its work in defiance of those requirements.

We are also of the opinion that the Western Union Telegraph Company had no right, under the privilege granted to it by the Act of 1866, to install a district telegraph system in the City of Toledo, as that act only extended its privileges to the business of telegraph companies."

These decisions of the United States Circuit and District Courts in the cases between the Western Union Telegraph Company and the City of Toledo sustain two propositions, namely: that the Chicago Telephone Company (The Illinois Bell Tel. Co.) cannot, by virtue of its right under the city ordinance to use the streets, confer a similar right upon the American Telephone and Telegraph Co. to do so without the city's consent; and that the local company which is only authorized to construct and maintain a local telephone exchange cannot own and operate the long-distance line of the American Telephone and Telegraph Company.

By analogy all the cases which distinguish city street railways from "commercial" railroads as to rights and obligations under the general law and their charters apply to establish the material distinction and limitation between the local and long-distance telephone systems.

Elliott on Roads and Streets (2d Ed.), Sec. 732.

1 Lewis on Eminent Domain, Sec. 110a.

The David Bradley Mfg. Co. v. Chicago & Southern Traction Co., 229 Ill. 170.

Rahn Township v. Street Railway Co., 167 Pa. St. 90.

Linden Land Co. v. Milwaukee Railway Co., 107 Wis. 511.

Harvey v. The Aurora and Geneva Railway Co., 174 Ill. 295.

Hartshorn v. Illinois Valley Traction Co., 210 Ill. 609.

Wilder v. Aurora, etc., Traction Co., 216 Ill. 493, p. 529.

City of Aurora v. Elgin Traction Co., 227 Ill. 485 (p. 498).

In the last case cited, *City of Aurora v. Elgin Traction Co.*, the court said (p. 498):

“The license to the Aurora Company cannot be assigned by it so as to invest the Joliet company with power to operate the passenger traffic of a commercial railroad or interurban railroad through the streets of the City of Aurora. The Aurora company did not by virtue of these ordinances, obtain the right to authorize a railroad company organized to transport passengers between points outside of the city to enter the City of Aurora and transact its business in and along the streets of the said City of Aurora over the lines of the street railway. The City of Aurora possesses the power and authority to determine whether interurban railroads chartered and authorized to convey passengers to the city limits shall bring their cars and passengers within the city streets and transport them on, in and along the streets to a depot in the city.”

Just so the Chicago Telephone Company did not, by virtue of the Ordinance of November 6, 1907, obtain the right to authorize a long-distance telephone company organized to transmit long-distance telephone messages between points throughout the State and outside the city, to enter the city and transact its business in and along the streets of the city over the lines of the Chicago Telephone Company. And the City of Chicago possesses the power and authority to determine when, how and upon what conditions and over what lines such long-distance telephone company may enter and conduct its telephone business in the city.

Even where the grant to use the streets is made to a public service corporation upon the express condition that such corporation shall permit other like corporations to use its tracks, conduits, poles, wires, etc., as the case may be, such other corporation has not the right to use such tracks, poles, wires, etc., without first obtaining the consent of the mu-

nicipality. This is established by a decision rendered by Chief Justice Taft, as Judge of the Superior Court of Cincinnati, in the case of *Hauss Electric Lighting Power Co. v. Jones Bros. Electric Co.*, *supra*. The facts are that plaintiff company had erected its poles and wires on Walnut and Vine streets, under authority of a decree of the Probate Court, which is invested "with what is practically a franchise-granting power." The defendant, desiring to construct a similar plant, and being prohibited from using the opposite side of said streets, "proposed to string its wires on plaintiff's poles, and to pay a just proportion of the original cost of the poles, and a fair monthly rental." The plaintiff company denied this right and obtained a preliminary injunction. This decision is on the motion to dissolve.

It was held that the grants of the Probate Court must be of concurrent effect with similar grants from the municipal authorities. A general ordinance provided that such grants to use the streets as were held by these companies should be subject to the right of other like companies, upon condition of payment therefor, to use their poles, wires, etc. The court says:

"This general ordinance seems to have been intended to subserve the same purpose with respect to such companies, that the probate court decree fulfills with respect to companies deriving its power from its statutory authority, *i. e.*, they each prescribe the mode of the use of the streets."

Both this general ordinance and the Probate Court's decree subjected such grants to use the streets to the right of other companies to use their poles, etc. Judge Taft decided, however, that the defendant company in this case had not the right to use plaintiff company's poles, etc., summing up his decision in these words:

"I come therefore to the conclusion that the only provision by which plaintiff is governed with respect to joint occupancy of its poles, is that contained in the decree. That occupancy cannot be had by another company except upon a grant from the city to such other company. I think I have shown that there is no such

grant by the city to the defendant, and there has been none by the court under the reservation of power to grant such right contained in the decree. It follows that defendant's only remedy is to apply to the city authorities or to the court for such a grant, and then act upon it."

IX.

THE MAINTENANCE AND OPERATION BY THE CHICAGO TELEPHONE COMPANY OR ITS ASSIGNEE, THE ILLINOIS BELL TELEPHONE COMPANY, EITHER FOR ITSELF OR FOR THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY, OF A LONG-DISTANCE TELEPHONE SYSTEM IN THE CITY OF CHICAGO, CONSTITUTES A NEW AND ADDITIONAL SERVITUDE, NOT AUTHORIZED BY THE ORDINANCE OF NOVEMBER 6, 1907, WHICH CANNOT BE IMPOSED WITHOUT SPECIAL GRANT OF LICENSE.

We think this proposition is sustained not only by the numerous cases already cited in support of the previously stated proposition that an ordinance grant to construct and operate one kind of telephone system, local exchange or long-distance line, will not authorize the construction and maintenance of the other, and by other decisions directly in point here; but this proposition is also sustained by the railroad case decisions to the effect that a railway already occupying the streets for passenger traffic cannot, without a new franchise, use such occupied streets for purposes of a commercial railroad or for carrying freight.

The case of *The People ex rel. City of Chicago v. Chicago Telephone Co.*, 220 Ill. 238, was a *quo warranto* proceeding to test the authority by which the Chicago Telephone Company, through special contracts with its patrons for supplying them with improved telephone service, collected rates which were higher than those established by the ordinance, although the ordinance prohibited the company "from increasing to its present or future subscribers the rates for telephone service then established." The company had accepted the ordinance with its terms and conditions and filed with its acceptance a schedule of the rates then charged for telephone service within the limits of the city.

The court held that the so-called improved telephone service at higher rates constituted a new and different telephone service than that authorized by the ordinance at fixed rates, and, therefore, that the Chicago Telephone Company was without warrant for the collection of the higher rates. The Supreme Court, in the course of its opinion says:

“We do not see how it can be said that the City of Chicago by its ordinance gave to the defendant rights which were not restrained by the limitations of the ordinance, and if the defendant is using the streets of the City of Chicago for a kind of telephone service which is not within the limitations of the ordinance it certainly is not within the grant. * * * The information charges in a number of counts that the defendant is exercising powers not conferred by law, and if the streets are being used for a new and unauthorized service that fact would sustain the charge.”

If this particular kind of local telephone service is not authorized by a grant of right to conduct a local telephone service in the city, how much more so is a long-distance telephone system not authorized by a grant to operate a local telephone exchange?

An ordinance granting the right to use the streets for purposes of a street railway does not warrant the use of such streets for purposes of a commercial or freight railroad, such freight service constituting a new or additional servitude.

McCartney et al. v. C. & E. R. R. Co., 112 Ill. 611.

Wilder v. Aurora, etc., Traction Co., 216 Ill. 493.

City of Aurora et al. v. Elgin, etc., Traction Co., 227 Ill. 485.

See also:

Gillette v. Aurora Railways Co., 228 Ill. 261.

Bradley Mfg. Co. v. Chicago & Southern Traction Co., 229 Ill. 170.

In *McCartney et al. v. C. & E. R. R. Co.*, *supra*, the court says (p. 638):

“Permission to lay down a track for passenger cars only, is something quite different from a permission to

lay a track for freight cars." (p. 638) "* * * When a railroad company lays its track in the street, having but the right to construct and maintain a track for passenger cars only, we think that under the provision of the statute the city has not power afterwards to grant the use of the tracks for the operation of freight cars upon it, except upon a petition of property owners upon the street, as named in the statute."

Placing an additional servitude upon the fee of a street or highway constitutes a taking of private property which cannot be done without just compensation. Const. of Ill., Art. 2, Sec. 13; Elliott on Roads and Streets, 306; Mills on Eminent Domain, Sec. 32.

In *Wilder v. Aurora, etc., Traction Co., supra*, the court says (p. 531):

"In our opinion the railroad to be constructed under appellee's charter, and under the ordinances authorizing it to lay its tracks in the streets of Aurora, is what is called a commercial railroad, and is not a street railroad within the definite and fixed meaning of the latter term. Being a commercial railroad, it constitutes a new and additional servitude upon the fee of the property owner to the center of the street. * * * And inasmuch as the appellee (Traction Co.) is about to construct a new and additional servitude in the street upon his (appellant's) property without having paid him any compensation or instituted any condemnation proceeding, he was entitled to an injunction in accordance with the prayer of his bill."

The Supreme Court, in the case of the *City of Aurora v. Elgin Traction Co., supra*, says (p. 496):

"The Joliet company is not a railroad organized for the purpose of operating a street railway in a city or town, but its function is that of an ordinary commercial railroad. The Aurora Street Railway Company by its charter had power to construct and operate a street railway. * * *

The Joliet company was chartered under the general Railway Act, and is engaged in operating an interurban railroad between Joliet and Aurora and it does not have authority to enter the streets of the City of Aurora with-

out the consent of the city. * * * The right to occupy the streets of a city with a railroad track and propel cars thereon can only be obtained by consent of the city council, and the council may prescribe the conditions and limitations under which license to occupy its streets may be granted. The city may require the payment of compensation for the license. (*Byrne v. Chicago General Railway Co.*, 169 Ill. 75; *Wells v. Northern Trust Co.*, 195 *id.* 288; 22 Am. & Eng. Ency. of Law, 2d Ed., 22. Such licenses are a legitimate source of city revenue."

All the courts make similar distinctions between the commercial or interurban railroad and the street railway on the one hand, and between the long-distance telephone system and the local telephone exchange on the other. And just as a commercial or interurban railroad cannot enter a city and operate its cars on the tracks of a street railway without that city's consent, because that would constitute a new servitude not contemplated and not authorized by a street railway grant, just so may a long-distance telephone line or system not enter the city over the lines of a local telephone company empowered by ordinance to construct and operate only a local telephone exchange in the city, without that city's consent, because a long-distance system, line, or business is a new and additional servitude not coming within the grant of license to operate a local telephone exchange.

X.

THE AUTHORITY OF THE CITY OF CHICAGO OVER ITS STREETS IS NOT ABROGATED OR AFFECTED BY THE CONTRACT OR SO-CALLED AGREEMENT OR "ARRANGEMENT" BETWEEN THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND THE CHICAGO TELEPHONE CO., AND SUCH AGREEMENT DOES NOT RELIEVE EITHER OF SAID COMPANIES OF THE LEGAL DUTY TO OBTAIN FROM THE CITY COUNCIL OF CHICAGO A GRANT OF LICENSE TO MAINTAIN AND OPERATE A LONG-DISTANCE TELEPHONE SYSTEM IN THE CITY.

The case of the *City of Aurora v. The Elgin, Aurora and Southern Traction Co.*, 227 Ill. 485, is decisive of this propo-

sition. This case decides not only that the Joliet company, chartered under the general Railway Act to engage in operating an interurban railroad between Joliet and Aurora, does not have authority to enter the streets of the City of Aurora without the consent of the city, and propel its cars on the tracks of the Aurora company, which is authorized by its charter and the ordinances of the City of Aurora to operate a street railway only, but it also decides that the written "operating contract" between the companies confers no such authority.

This contract consisted of a preamble and thirteen clauses which are set out almost entirely in the report of the case. The preamble recites the fact that the Fifth street line of the Aurora company's street car system and the line of the Joliet company's interurban railway practically connected at the eastern limits of the City of Aurora, and that it is mutually desirable that the Aurora company should lease the cars of the Joliet company wherein to convey the passengers coming in on the interurban cars to and from points along said Fifth Street Car line to and from the point of connection of the two companies at the city limits, and further that it is mutually desirable that the Aurora Company shall carry "express, mail or other matter destined to and from points of said Joliet company, so far as it shall be able to do under the municipal or statutory ordinances or regulation." The second clause provides that "the Aurora Company shall have the right to take the cars of the Joliet company at the point of connection aforesaid and to use the same for the purposes aforesaid; and said Joliet company shall furnish the necessary men and employes to man said cars and to operate the same * * * and said employes * * * shall be considered * * * the employes of the Aurora company, * * * but all of said employes shall be paid by said Joliet company and shall be furnished by it to said Aurora company without charge or expense to it; and said cars, while upon the tracks of the Aurora company, shall be considered * * * cars of the Aurora company and oper-

ated by it; and the said Aurora company shall receive as compensation," etc.

Speaking of this contract the Supreme Court says:

"The effect of the agreement between the Aurora company and the Joliet company, if it is enforceable, is to confer on the Joliet company authority to extend the line of its road into the streets of the city and to propel its cars, manned by its employes who are paid out of its treasury, along the streets from the city limits to the transfer station of the Aurora company, which by the contract becomes, in effect, the depot of the Joliet company. The provision of the agreement that the employes of the Joliet company were to be deemed employes of the Aurora company while in the streets of the city though to be paid by the Joliet company, had no magical effect to convert the interurban coaches into street cars, or the passengers who were making trips from other points to Aurora, or *vice versa*, into passengers of a street car line proceeding from point to point within the city. The authority of the City of Aurora over the streets is not abrogated or at all diminished by the provisions of the contract.

The Appellate Court declared the contract did not confer lawful authority on the Joliet company to transport freight, express, baggage and mail in the cars along the street car tracks of the city. This holding was right, because the license and charter of the Aurora company are not broad enough to authorize the Aurora Company to confer power on the Joliet company to transport baggage, freight, express and mail through the streets of Aurora. We think the same reasoning ought to be given application with respect to the authority granted to the Aurora company by charter and ordinances to operate its street cars and carry passengers on the Fifth street line. That authority is not broad enough to empower the Aurora Company to confer upon the Joliet company the right to transport its passenger cars and passengers over the line in question.

An ordinance granting the privilege to a street railway company to lay its tracks and operate its cars in the city is always to be strictly construed in favor of the public and against the licensee. Nothing passes by mere implication against the public, and that which is not unequivocally granted is withheld. *Holyoke Water Power*

Co. v. Lyman, 15 Wall. 500; *Coosaw Mining Co. v. South Carolina*, 144 U. S. 550; *Packer v. S. & E. R. R. Co.*, 7 Harris, 211; *People ex rel. v. Newton*, 112 N. Y. 396."

It was earnestly contended that this "operating contract" between the companies was authorized by Sections 44 and 45, of Chapter 114, of the Railroad Act (Hurd's Revised Statutes of 1905), which provide that "all railroad companies * * * shall have power to make such contracts and arrangements with each other * * * for leasing or running their roads or any part thereof; * * * and shall have the right of connecting with each other * * * on such terms as shall be mutually agreed upon by the companies * * *."

In disposing of the contention the court said:

"In *City of Chicago v. Evans*, 24 Ill. 52, it was held that two horse railways might, under the quoted sections, unite their roads and make running arrangements with each other, but the fact is there pointed out that the two roads were 'created for the same purpose.' It also appears that both were operating in the same city and that each had permission from the municipal authorities to operate a street railway in the streets of the city. Appellee roads were not created for the same purpose, were not operating in the same city, and but one of them had permission from the City of Aurora to engage in operating a street railway in the streets of the city. We do not think the case just referred to determines the question of the right to enter into this contract. A street railway is not an additional burden upon the street of a city, while a commercial railroad is a further burden upon such way. (*Wilder v. Aurora, DeKalb and Rockford Traction Co.*, 216 Ill. 493.) It follows that a street railway company may not lawfully carry the cars of a commercial railroad for the purpose of transporting therein passengers of the latter over the lines of the street railway without the permission of the city authorities of the city in which the lines in question are located. If it were otherwise, the power to determine when, where and in what manner interurban lines should enter a city and traverse its thoroughfares with passenger traffic would be lodged, in great part, not in the city authorities, but in the street railway company in every

city where a street railway company is rightfully operated."

Observing the similar distinctions which the courts make, as we have already shown, between the interurban and city street railway on the one hand, and the long-distance and local telephone systems on the other, and noting the striking similarity between the contract of the two railroad companies in the case cited and the agreement between the American Telephone and Telegraph Company and the Chicago Telephone Company, we have only to substitute these two telephone companies respectively for the Joliet interurban railroad company and the Aurora city street railway company in the foregoing opinion to make that decision determine the issues between the City of Chicago and the two telephone companies respecting their right, with or without their contract, to bring the American Telephone and Telegraph Company's long-line business into the City without the City's consent. As the court says:

"where a corporation chartered to operate (a long-line telephone system) desires to enter a city of this state and (send its messages over long-distance poles and wires in the streets of such city) it must seek and obtain a license to do so from the city, subject to such reasonable rules and regulations as the municipality may find it necessary or proper to establish" (p. 500).

"The authority of the city of (Chicago) over its streets is not abrogated or at all diminished by the provisions of the contract" (p. 497).

Nor is there any provision in the Telegraph and Telephone Acts authorizing contracts between telephone companies, such as appears in the general Railway Act authorizing certain contracts between railroad companies.

We distinguish here the case of *The Illinois Midland Railway Co. v. The People ex rel.*, 84 Ill. 426, which held a plea to an information in the nature of *quo warranto* to be substantially good in behalf of the railway company which alleged in general terms a contract between itself and another railroad company for running and operating the road in

question "as it lawfully may." The Supreme Court reversed an ouster judgment rendered against the railway company on sustaining a demurrer to this plea, and stated as reasons for its decision that the parties had capacity to contract; that the statute authorized railroads to contract for leasing and running their respective roads; that the railroads had contracted as plead, all of which facts were admitted by the demurrer, and that they presented a defense to the charge of usurpation of franchise, etc.

"We do not understand," said the court, "it was necessary to exhibit the contract with the plea. That is matter of evidence, and what its terms are, whether it sustains the plea or not, will be made known when it is produced."

Thus it is that the validity of the contract between the railroad companies and its sufficiency to warrant the operation of the road in question was neither tendered as an issue in the trial court nor decided on appeal, and the case decides nothing but an error of pleading.

XI.

THE AGREEMENT BETWEEN THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND THE CHICAGO TELEPHONE COMPANY IS ULTRA VIRES THE CHICAGO TELEPHONE COMPANY.

Crosswell on Electricity, Sec. 158.

37 Cyc. 1620, Par. 4.

12 R. C. L. 217.

Thomas v. Railroad Company, 101 U. S. 71.

Penn. R. R. Co. v. St. Louis, Alton, etc., R. R., 118

U. S. 290; 6 Sup. Ct. 1094; 30 L. Ed. 83.

Central Transp. Co. v. Pullman Pal. Car Co., 139

U. S. 24; 11 Sup. Ct. 478; 35 L. Ed. 55.

Cumberland Tel. & Tel. Co. v. City of Evansville,
127 Fed. 187.

People ex rel. v. Commercial Tel. Co., 277 Ill. 265.

Archer et al. v. T. H. & I. R. R. Co., 102 Ill. 493.

People ex rel. Fitzhenry v. Union Gas & Elec. Co.,
254 Ill. 395.

As already shown, the ordinance of November 6, 1907, which is the sole authority for the Chicago Telephone Company's operations in the City of Chicago, grants the right to maintain and operate only a local telephone exchange. And, acting under the ordinance, only a local telephone exchange was operated by the company, with no thought or attempt to engage in any way in the long distance telephone business, except to receive and distribute the long-distance messages brought into the city by the American Telephone and Telegraph Company over the long distance system which that company had long since installed and operated in the city, and to transmit through its local exchange to the long-distance exchange of the American Company in the city all outgoing messages, all of which is a regular and legitimate part of the local telephone exchange business. Not until the American Telephone and Telegraph Company's usurpation of the city's streets for purposes of its long-distance telephone system was questioned, and that company, instead of legalizing its position by applying for and receiving an ordinance grant of authority from the city council, sought ways and means by which it might continue to ignore the city, its power over the streets and its right to compensation for their use; and not until the Chicago Telephone Company, with full knowledge of the facts and this purpose, was approached by the American Telephone and Telegraph Company to enter into the contract in question, did the Chicago Telephone Company assume any right to own and operate a long-distance telephone system. Now conceding for the moment and for our immediate purpose only, that the Chicago Telephone Company was empowered by the ordinance of November 6, 1907, to engage in the long-distance telephone business, what has it done by the contract with the American Telephone and Telegraph Company? Has it become the owner of a real long-distance telephone system over which it is possible to conduct its own long-distance business? Indeed not, it has no such ownership nor control of any long-distance system, nor is it possible for the company to conduct any long-distance business for itself. The purported contract appears to transfer just a

piece of a long-distance telephone system to the Chicago Telephone Company—that part of the American Telephone and Telegraph Company's illegal, offending and trespassing “plant located upon, along or under the streets of the City of Chicago,” which constitutes an essential part of the American Company's plant without which that company can conduct no long-distance business in or out of the City of Chicago, and with which the Chicago Telephone Company can conduct no long-distance telephone business anywhere. If the Chicago Telephone Company has acquired anything at all by this contract it is *a long-distance telephone system located wholly in Chicago*. (An absurdity in fact and in contemplation of law.)

But granting that the Chicago Telephone Company by this contract acquired a real long-distance telephone system capable of operation by the company in the long-line telephone business, the very same contract, expressly provides that all but the ownership of the plant, that is, the use, possession and control thereof shall remain in the American Telephone and Telegraph Company; that “under existing contract the Chicago Company will be entitled to a reasonable division of the tolls and profits derived from business passing over its plant to and from points on the system of the American Company,” and that “the American Company will pay the Chicago Company monthly for the use of this plant.” Thus the so-called long-distance plant acquired by the Chicago Telephone Company through this paper transaction was, as part of the same transaction, immediately transferred and leased to the American Telephone and Telegraph Company. So the facts are, as testified by Mr. U. F. Cleveland, General Auditor of the Illinois Bell Telephone Company, “that the Illinois Company makes no use of that plant except so far as messages are transmitted over that plant for connection with the American Company's plant beyond. That is, it is used practically as part of the American Company's plant except that title is in the Illinois Company, which pays a rental for the use of it. That plant is used exclusively for the long lines business of the American Company.”

If the local company had a franchise to operate such a long-distance plant it was powerless to lease or transfer such franchise to the American Telephone and Telegraph Company.

In the work of Crosswell on Electricity, Section 158, it is said:

“A grant to a telephone, telegraph, electric light or railway company of the power to use the streets, highways and post roads for the stringing of its wires and the setting of its poles contains so much of an element of personal obligation that such a grant is not assignable unless a power of assignment is expressed in the language of the grant or in some general legislation affecting the subject.”

And in 37 Cyc. 1620, Par. 4, appears the following statement:

“The same principles which prevent a telegraph or telephone company from selling its franchises and property without legislative authority have been held to prevent a lease of the same.”

No language is contained in the ordinance grant to the Chicago Telephone Company authorizing the assignment or lease of its plant, and the general Telephone and Telegraph Acts of Illinois confer no such authority.

The case of *Thomas v. Railroad Company*, 101 U. S. 71, *supra*, is presented by Justus Miller in his opinion and decision in the case of *Penn. Co. et al. v. St. Louis, Alton, etc., R. R.*, 118 U. S. 290, also cited above. Justice Miller says:

“In that case a railroad company in New Jersey had leased its road, franchises, and property for a period of twenty years, yielding as in this case, complete control of it all to the lessees, and receiving as rent one-half the gross sum collected by the lessees from the operation of the road. The agreement contained a condition that the railroad company might at any time terminate the contract and take possession of the property; but in that event they should pay to the lessees the value of the lease for the remaining period of the twenty years to which the lease extended. The company exercised the option, took possession of the road and suit was

brought to recover on this covenant. *Thomas v. Railroad Company*, 101 U. S. 71.

The decision turned upon the power of the company under its corporate authority to make the lease. The plaintiffs in error, who were the lessees, insisted that a corporation may as at common law, do any act, which is not either expressly or impliedly prohibited by its charter although, where the act is unauthorized, a shareholder may enjoin its execution, and the State may, by proper process forfeit the charter. To this the court responded:

'We do not concur in this proposition. We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the power of corporations organized under legislative statutes are such and such only as these statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others.' * * *

It is not expedient here to go again over the ground there considered, as we are of the opinion now, as we were then, that the great preponderance of judicial decisions supports the proposition above stated.

It has been distinctly recognized and repeated in this court in the case of the *Green Bay & Minnesota Railroad Co. v. Union Steamboat Co.*, 107 U. S. 98.

It is cited with approval in the Supreme Court of Massachusetts in the case of *Davis v. Old Colony Railroad Co.*, 131 Mass. 258."

Justice Miller concludes his opinion on this branch of the case as follows:

"We think it may be stated, as a just result of these cases and on sound principle, that unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of the powers, nor can any other railroad company without similar authority make a contract to receive and operate such road, franchises and property of the first corporation, and that such contract is not among the ordinary powers of a

railroad company, and is not to be presumed from the usual grant of powers in a railroad charter."

In *Central Transp. Co. v. Pullman Pal. Car Co.*, 139 U. S. 24; 11 Sup. Ct. 478; 35 L. Ed. 55, the Supreme Court, after reviewing these and other cases, said (p. 48):

"The clear result of these decisions may be summed thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of these powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of these powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: The obligation of every one contracting to take notice of the legal limits of its powers; the interest of the stockholder not to be subjected to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law. A corporation cannot, without the assent of the Legislature, transfer its franchise to another corporation and abrogate the performance of the public duty imposed upon it by its charter as the consideration for the grant of its franchise. Neither the grant of a franchise to transport passengers nor a general authority to sell and dispose of property empowers the grantee, while it continues to exist as a corporation, to sell or lease its entire property and franchise to another corporation. These principles apply equally to companies incorporated by special charter from the Legislature and to those formed by articles of association under general laws."

The United States District Court, in the case of *Cumberland Tel. & Tel. Co. v. City of Evansville*, *supra*, reviewed the foregoing decisions and applied the general proposition therein stated to the contract of assignment or lease between two telephone companies, holding such a contract of the local telephone exchange company to be *ultra vires*.

The Supreme Court of Illinois, in *People ex rel. v. Commercial Tel. Co.*, *supra*, after citing the cases above referred to in support of the proposition stated, says: •

"The decisions of this court are in harmony with the foregoing authorities in all cases where the subject

has been considered. *Bruffett v. Great Western Railroad Co.*, 25 Ill. 310; *Chicago Gas Light Co. v. Peoples Gas Light Co.*, 121 *id.* 530; *Fietsam v. Hay*, 122 *id.* 293; *People v. Central Union Telephone Co.* (232 Ill. 260)." * * *

"By the foregoing authorities the conveyance of the Westfall Telephone Company to plaintiff in error is absolutely void so far as the Village of Crossville and the State is concerned, and transferred no right to it to use the streets and alleys of that village for the purpose of transacting a telephone business. Our statute expressly provides that no telephone company shall have the right to erect any poles, wires or other fixtures of its line upon any street, alley or other highway or public ground within any incorporated city, town or village without the written consent of the corporate authorities thereof."

The agreement or arrangement between the Chicago Telephone Company and the American Telephone and Telegraph Company purports to lease and transfer to the latter company for its exclusive use all the former company's long distance telephone system in the City of Chicago. The American Telephone and Telegraph Company continues, as before, to do all the long-distance telephone business of the city of Chicago, without any local franchise, license, or permit for the use and occupation of the city's streets, unless by this agreement it has acquired the franchise right of the Chicago Telephone Company to do so. But as we have seen, the Chicago Telephone Company had no franchise or right to own and operate a long-distance telephone system, and, even if it had such a franchise, it was wholly beyond the corporate powers of such company to transfer to the American Telephone and Telegraph Company or to any other corporation such telephone system and its franchise right to operate it. See *People ex rel. Fitzhenry v. Union Gas & Elect. Co.*, 254 Ill. 395.

It does not help matters legally for the American Telephone and Telegraph Company to say that the contract, though *ultra vires* the Chicago Telephone Company, is within its charter powers to execute, and is therefore not invalid as to it. This contention was made and overruled by the U. S.

Supreme Court in the case of *Penn. R. R. Co. et al. v. St. Louis, Alton, etc., R. R. Co. et al., supra.*

Speaking of this case the U. S. District Court in *Cumberland Tel. & Tel. Co. v. City of Evansville*, 127 Fed. 187, p. 192, said:

“In that case a lease which an Illinois corporation was expressly authorized by the laws of Illinois to make was invalidated because an Indiana Corporation was not authorized by the laws of Indiana to accept it. A petition for rehearing was overruled notwithstanding the Indiana Corporation was authorized by the laws of Indiana to make such contract ‘for the use of its road as to the board of directors * * * might seem proper.’ (*Penn. R. R. Co. et al. v. St. Louis, Alton, etc., R. R. Co. et al.*, 118 U. S. 630), and the law of the case was reaffirmed in *St. L., Vandalia, etc., R. R. Co. v. Terre Haute & Indianapolis R. R. Co.*, 145 U. S. 393, 402, 12 Sup. Ct. 953, 36 L. Ed. 748, and fully recognized by the Circuit Court of Appeals for the Seventh Circuit in *Central Trust Co. v. Indiana, etc., R. R. Co.*, 98 Fed. 666, 39 C. C. A. 220.”

XII.

THE AGREEMENT BETWEEN THE TWO TELEPHONE COMPANIES IS VOID, NOT ONLY BECAUSE IT IS *ULTRA VIRES*, BUT ALSO FOR THE REASON THAT IT VIOLATES PUBLIC POLICY.

In *Thomas v. The Railroad Co.*, 101 U. S. 71, 83, 25 L. Ed. 950, the court said:

“There is another principle of equal importance and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires*, as we have just discussed it shows very clearly, that the railroad company was without the power to make such contract. That principle is that where a corporation like a railroad company has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the State, to transfer to others the rights and

powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy."

The foregoing language was quoted and applied by the U. S. District Court in the case of *Cumberland Tel. & Tel. Co. v. City of Evansville*, 127 Fed. 187, 196, to sustain its decision that the contract between the two telephone companies in that case was void as against public policy.

See *Central Transp. Co. v. Pullman Co.*, 139 U. S. 24, 35 L. Ed. 55.

Pullman Pal. Car Co. v. Transp. Co., 171 U. S. 138, 43 L. Ed. 108.

The Supreme Court of Illinois, in the case of *Union Trust & Savings Bank, etc. v. The Kinloch Long Distance Co. of Mo.*, 258 Ill. 202, 208, said:

"The business of such corporations is public in its nature, and is the exercise of a franchise granted by the State, not for the benefit of the private corporation, only, but for the benefit of the public as well. A corporation receiving such a grant owes a duty to the public, and it cannot, without the consent of the State, disable itself from performing any part of the functions which its charter authorizes it to perform. A contract to do so is in violation of its duty to the State and is void as against public policy. *Chicago Gas Light Co. v. Peoples Gas Light Co.*, 121 Ill. 530; *People v. Chicago Gas Trust Co.*, 130 Ill. 268; *South Chicago City Railway Co. v. Calumet Street Railway Co.*, 171 Ill. 391; *Thomas v. West Jersey Railroad Co.*, 101 U. S. 71; *Gibbs v. Consolidated Gas Co.*, 130 Ill. 306."

Although the Public Utilities Act of 1913 was not in force at the time of the agreement and transfer between the Chicago Telephone Company and the American Telephone and Telegraph Company, we believe its provisions with respect to such contracts are declaratory of the long-existing public policy of the State. Sec. 27 of that Act provides:

“Unless the consent and approval of the commission is first obtained:

(a) No two or more public utilities may enter into contracts with each other that will enable such public utilities to operate their lines or plant in connection with each other;

(b) No public utility may purchase, lease, or in any other manner acquire, control, direct or indirect, over the franchises, licenses, permits, plant, equipment, business, or other property of any other public utility;

(c) No public utility may assign, transfer, lease, mortgage, sell or otherwise dispose of or encumber the whole or any part of its franchises, licenses, permits, plant, equipment, business, or other property. * * *’
Hurd’s Stat. 1916, p. 2029, Reenacted June 29, 1921,
Cahill’s Stat. 1923, p. 2685.

We are inclined to the belief that the contract between the Chicago Telephone Company and the American Telephone and Telegraph Company is “adopted for and adapted to” the creation of a monopoly of the long distance telephone business in the City of Chicago, and that it may be void as against public policy for that reason also. We are unable to secure all the “agreements” existing between the companies in relation to the long-line business in the city. In the correspondence proposal of the American Telephone and Telegraph Company to the Chicago Telephone Company of date February 14, 1911, which is set out in our statement of facts, this stipulation is made: It is understood that this arrangement applies to and affects only the main line plant used for long line purposes, and located upon, along and under the streets of the City of Chicago; to be operated in accordance with the terms of existing agreements between our respective companies, the same to remain in full force except as expressly modified by the arrangement outlined above.” What these “existing agreements” are we are unable to ascertain.

Viewed in the light of the attendant circumstances at the time of the correspondence between the companies; con-

sidering that the long-distance system in Chicago was owned, controlled and exclusively used by and for the American Company; that provision was made for the mere transfer of the "ownership" of the line to the Chicago Telephone Company; that the exclusive possession, use, control and benefit of the line were retained by the American Company; and that the long distance system is and can be used by no other long-distance telephone company; and, that the Chicago Telephone Company is powerless under the "arrangement" with the American Company to grant any right or permit to any other long-distance telephone company to do business through its exchanges, we believe the so-called agreement or arrangement between these two companies is as much to be condemned as those written contracts where it is expressly stipulated that the local telephone company shall not contract for service to any other long-distance company. An agreement or "arrangement," the obvious purpose and effect of which is monopoly, must be held void, as well as a contract, the express stipulation of which is construed to intend monopoly. To use the phrase of U. S. Circuit Judge Knappen in *Bigelow v. Calumet & Hecla Co.*, 155 Fed. 869, 875, such contracts must be condemned because "adopted for and adapted to" restraint of trade and monopoly. We believe a full disclosure of all the agreements and arrangements between the American Telephone and Telegraph Company and the Chicago Telephone Company will bring their long-distance telephone arrangement within the condemnation of the following court decisions:

United States Telephone Co. v. Central Union Telephone Co., 202 Fed. 66.

The Union Trust & Savings Bank et al. v. Kinloch Long Distance Telephone Co., 258 Ill. 202, affirming 169 Ill. App. 309.

XIII.

IF THE AGREEMENT BETWEEN THE TELEPHONE COMPANIES BE VALID, IT DOES NOT HAVE THE EFFECT TO TERMINATE OR EVEN CAUSE A SECESSION OF THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY'S LONG AND UNAUTHORIZED USE AND OCCUPATION OF THE CITY'S STREETS; NOR DOES IT MAKE POSSIBLE SUCH CONTINUED USE AND OCCUPATION WITHOUT FRANCHISE LICENSE OR PERMIT FROM THE CITY COUNCIL.

The stated purpose of the agreement between the companies is to effect "an arrangement which leaves in the Chicago Telephone Company the ownership of all the plant * * * used in the long line business within the present city limits." Accordingly "it is agreed that this plant * * * shall be turned over to the Chicago Company and an adjustment made."

That this agreement is intended to and does turn over to the Chicago Company nothing but the naked legal title to this "long-distance plant" is clearly established by three separate provisions in the letter of the American Telephone and Telegraph Company which constitutes the major part of the agreement. The first provision is that "under existing contract, the Chicago Company will be entitled to a reasonable and suitable division of the tolls and profits derived from business passing over its plant to or from points on the system of the American Company"; second, that "the American Company will pay the Chicago Company monthly *for the use of this plant*, and third, (the saving clause), "It is understood that this arrangement applies to and affects only the main line plant used for long line purposes, and located upon, along and under the streets of the City of Chicago; to *be operated in accordance with the terms of existing agreements* between our respective companies, the same to remain in full force except as expressly modified by the arrangement outlined above." It is quite apparent from the contract itself that there was no intention to surrender possession and

use of this long distance line to the Chicago Company. As part of the same contract, and therefore concurrently with the transfer of the ownership of the American Company's long distance line to the Chicago Company the American Company retains the possession, use and control of the line. Were it not for the stipulation that the American Company will pay a monthly rental for the use of this plant, the agreement might be construed as a trust by which the Chicago Telephone Company, as mere passive trustee, takes the legal title to the long distance line in Chicago in trust for the American Telephone and Telegraph Company, which retains the equitable interest, the exclusive possession, use, control and benefit of the line. But whether under a trust "arrangement" or as lessee of the long-distance line, there was not for a moment any relinquishment of the absolute and exclusive possession of this long-distance line in Chicago by the American Telephone and Telegraph Company. This agreement between the companies constitutes a conclusive admission by both companies that at the time it was entered into the American Company was and always had been unlawfully in the use and occupation of the city's streets. The mere transfer of the empty legal title cannot make possible the American company's continued use and occupation of the city's streets without grant of right by the Chicago City Council. For it is the actual physical possession, use and occupation of the streets, which the American company continues, that is material in this case and not the abstract idea of naked legal "ownership."

Let it be assumed for an instant that the American Telephone and Telegraph Company, by this "arrangement" with the Chicago Telephone Company, has succeeded in washing its hands of all its long-past illegal taint and status in the construction, maintenance and operation of the long distance telephone plant in the streets of Chicago, did it not at the same instant acquire by lease the continued use of that same outlaw plant and continue as before in its operation? Not till two years later did it pretend to transfer to the Chicago Company the operation of the plant by transferring all its

employees to the payroll of the Chicago Company and then reimbursing the Chicago Company for the advancement so made.

The American Company, by this "arrangement" merely changed its character from that of legal owner of the trespassing plant to that of equitable owner or lessee thereof. But in this changed character the American Telephone and Telegraph Company continues responsible for the illegal use and occupation of the city's streets. Such acquisition of the long-distance telephone line from the Chicago Telephone Company by the American Telephone and Telegraph Company would have fulfilled a franchise granted to the American Company to erect and operate such a line.

"The grant of a franchise to erect, maintain, and operate a telephone system authorizes the purchase of one which is already in existence, and fulfills the grant."

37 Cyc. 1614, citing *Eby v. Lathrop*, 128 Mo. App. 315, 107 S. W. 410.

The converse of this proposition is true: the acquisition of a telephone line by purchase or lease, which carries with it no franchise, requires the granting of a franchise for its maintenance and operation.

In *Eby v. Lathrop*, *supra*, the court said:

"When they (appellants) elected to purchase the system that was in operation they had what their franchise called for and were entitled to nothing more. The franchises under which plaintiffs claim the right to erect a telephone exchange are without power or life, '*functus officio*,' in so far as their right to erect and operate another and new system of the kind is concerned."

XIV.

THE POWERS OF THE CITY OF CHICAGO UNDER THE LAW PERTAINING TO THE PRESENT STATUS OF THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND THE ILLINOIS BELL TELEPHONE COMPANY, ASSIGNEE OF THE CHICAGO TELEPHONE COMPANY.

The state has absolute control of its public streets and highways subject only to the constitutional limitations; and

the power is generally delegated to municipalities to be exercised over their own streets, alleys and public ways.

13 R. C. L., Sections 143, 144.

And this municipal power is liberally construed so as to effect the object of the grant.

28 Cyc. 849.

The regulation of the occupation and use of the highways is a well-recognized exercise of the police power of the State.

Cooley, Const. Lim., p. 588.

The broadest application of the police power to the regulation of the use and occupation of streets and highways is made by the enactment of statutes by which municipal authorities are given the right to regulate the erection and maintenance of electric lines on the highways. Such statutes have been enacted in many states.

Crosswell on Electricity, Chap. 6.

We have already shown that the general telegraph and telephone acts of Illinois expressly recognize and reserve to the municipalities the full exercise of the police power over the erection and maintenance of telephone lines located within their limits.

The right to exercise this police power is inferable from the general power given to municipal governments to regulate the use of the streets, even when it is not especially conferred upon them by the direct terms of a statute.

Dill. Mun. Corp., Sec. 691.

St. Louis v. Western Union Telegraph Co., 149 U. S. 465.

And the courts have uniformly held that it is a valid and proper exercise of the police power of the state.

Cases cited in note to *State ex rel. LaCledé Gas-Light Co. v. Murphy* (Mo.), 31 L. R. A., pg. 800.

Concerning the exercise of this police power by the municipalities in Illinois, the Supreme Court, in *People ex rel. v. Chicago Telephone Company*, 245 Ill. 121, pg. 134, said :

“Primarily the General Assembly, representing the people at large, possessed full and paramount power over all highways, streets and alleys in the State. In the distribution of governmental powers it has, however, delegated to municipalities the power to regulate and control the use of the streets and alleys within their respective limits, and municipal authorities, when exercising the power thus delegated, are acting in behalf of the State for the benefit of the people (*People v. Suburban Railroad Co.*, 178 Ill. 594; *Harder’s Storage Co. v. City of Chicago*, 235 *id.* 58). In granting to the Chicago Telephone Company a license to construct its poles, wires and other fixtures in the streets and alleys of the town, the board of trustees of the Town of Cicero was exercising the power to regulate and control the use of the streets and alleys within the limits of the town which had been delegated to it by the General Assembly. It was exercising a legislative function as a governmental agency of the State, and the grant was made by the town in its governmental and not its proprietary capacity (*People v. Suburban Railroad Co.*, *supra*; *Roly v. City of Chicago*, 215 Ill. 604.) The grant thus made was a license which, when accepted by the Telephone Company, became a contract between the town as a governmental agency of the State and the telephone company (*City of Quincy v. Bull*, 106 Ill. 337; *People v. Chicago Telephone Co.*, 220 *id.* 238; *City of Chicago v. Chicago Telephone Co.*, 230 *id.* 157).”

In *Springfield v. Postal Telegraph Co.*, 253 Ill. 346, page 353, the Supreme Court makes the following exposition of the law relative to the power of municipalities to charge compensation and fees for the use of the streets, to wit:

“The municipalities in this State may regulate such use (of streets) and fix a reasonable compensation to be paid for the same (*Lobdell v. City of Chicago*, 227 Ill. 218). This includes use for poles of telegraph or telephone companies (*Chicago Telephone Co. v. Northwestern Telephone Co.*, 199 Ill. 324; *Village of London Mills v. White*, 208 *id.* 289; *McWethy v. Aurora Electric Light Co.*, 202 *id.* 218). Municipal corporations vested with the control of public property and property devoted to public uses within their territorial limits, including the streets and highways can impose upon tele-

graph and telephone companies using the streets of the city by permission or license and not under an irrevocable grant or franchise, a reasonable charge in the nature of a rental for the exclusive use of the parts of the streets occupied by poles. Similar charges may be imposed upon public service corporations occupying the streets of a municipality, not by way of rental but in exercise of police power, this charge being in the nature of a license tax—not a tax on property of the company—for the enforcement of local governmental supervision. 3 Dillon on Mun. Corp. (5th Ed.), Sec. 1275; *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 93; *St. Louis v. Western Union Telegraph Co.*, 149 U. S. 465; *Postal Telegraph-Cable Co. v. Baltimore*, 156 *id.* 210; *Western Union Telegraph Co. v. New Hope*, 187 *id.* 419; *Atlantic and Pacific Telegraph Co. v. Philadelphia*, 190 *id.* 160.”

See also:

Springfield v. Postal Telegraph Co., *supra*.

City of Peoria v. Postal Cable Co., 274 Ill. 568.

Note to 31 L. R. A., page 808, citing cases.

Various other particular powers and the exercise thereof by the municipality have been shown in the consideration of many cases throughout the foregoing opinion, but we are not disposed to consider them again under this particular heading, and extend the opinion to greater length than has already been made necessary by a proper and thorough presentation of all the issues, direct and collateral, involved in this important case.

XV.

THE CITY OF CHICAGO IS NOT PRECLUDED OR ESTOPPED BY ANY ACTION OR INACTION ON ITS PART IN ANY PROCEEDING AGAINST THE TELEPHONE COMPANIES FOR THEIR OCCUPATION AND USE OF THE CITY'S STREETS WITHOUT GRANT OF FRANCHISE, LICENSE OR PERMIT THEREFOR.

An excellent statement of the law and equity in support of this proposition and particularly applicable to the case of the telephone companies appears in the case of *Holland*

Realty & Power Co. v. City of St. Louis, 221 S. W. 51, pages 53 and 54. The statement follows:

“The statutes cited required the consent of the city to be given by the ‘municipal authorities,’ and this means the legislative authorities acting by ordinance. 4 McQuillin, *Munic. Corp.*, sec. 1643, p. 3433; *State ex inf. v. Light & Power Co.*, 246 Mo. 653, 666, 152 S. W. 76. The general ordinance on the subject required consent to be granted in the same mode, unless a prior ordinance had been complied with, and admittedly it had not. Besides the parties stipulated that the pleadings in the case, and the stipulation itself should constitute an agreed statement of the facts whereon the case was submitted; and the answers alleged the wires were laid and had been maintained without municipal authority.

When consent to use a city’s public ways can be obtained only from its own legislative assembly, and in a particular mode (in this case by an ordinance), the administrative officers cannot waive the necessity of procuring consent from the assembly, and in the prescribed mode. Neither can they, by acquiescing in the use of a public way by a utility corporation estop the city to terminate the use. *Dugdale v. Light & Power Co.*, 195 Mo. App. 243, 256, 189 S. W. 830; *Township of Bangor v. Bay City Traction Co.*, 147 Mich. 165, 110 N. W. 490, 7 L. R. A. (N. S.) 1187, 118 Am. St. Rep. 546, 11 Ann. Cas. 293, and note on page 297; *Mullins v. Kansas City*, 268 Mo. 444, 188 S. W. 193, 197; *Detroit v. Railway Co.* (C. C.), 60 Fed. 161; *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296, 316, 22 C. C. A. 334.

The last case cited is a striking application of the doctrine, for the railroad company concerned had, at great expense, changed its motive power from horse power to electricity pursuant to resolution of the City’s board of public affairs, after the railway company’s franchise in the streets had expired. It was held the board of public affairs could not estop the city by its resolutions to deny the company’s right to use the streets any longer; and, further, that the nonaction of the city government after the expiration of the franchise in failing to insist on the removal of the tracks worked no estoppel. Equally strong is the language of Taft, Judge, in *Detroit v. Railway Co.* (C. C.), 60 Fed. 161, 166, in holding there could be no estoppel of a city by reason of the expenditure of much money by a street railway company, on

the faith of a grant of street privileges, to deny the validity of the grant. The opinion critically examines decisions supposed to sustain an estoppel under such circumstances and also the argument of an eminent author in favor of applying the doctrine of estoppel to municipalities in rare instances, showing clearly that no authority existed which would preclude the city to prevent, by an injunction, the railway company from occupying the streets and running cars over them. Speaking of the argument of Judge Dillon, the court said:

“And while Judge Dillon is of the opinion (in which he is supported by many authorities) that an estoppel may be asserted against a municipal corporation to defeat its attempt to oust persons asserting private rights in a public street, he says that such cases are exceptional, and must depend on their own peculiar circumstances. But nowhere in this valuable work does he intimate and no authority has been cited, which holds, that a municipal corporation can be estopped *in pais* to deny a grant in the street to a railroad corporation or other person when the statute prescribed for the corporation a particular mode of making the grant.” * * *

In two decisions which construed the very statutes and ordinance under present consideration, this court ruled that the executive officers of St. Louis could not waive a forfeiture for nonuser of privileges in the streets which had been given by ordinance to companies formed to furnish electric light and power; the companies having failed, over a long period, to serve the public (citing cases). The defendants cannot be held to have lost by acquiescence, whatever right they may have had to remove plaintiff's wires from the alleys.”

The telegraph and telephone acts of Illinois similarly require the consent of the city to be given by the “corporate authorities,” and the Supreme Court of Illinois has held that the telephone act “gives no authority to a telephone corporation to set poles or string wires in the street of any incorporated city, town or village without the consent of the corporate authorities.”

Cahill's R. S. of Ills., 1923, Sec. 4, p. 3311.

People ex rel. v. Central Union Tel. Co., 232 Ill. 260.

We may well quote again from *Holland Realty & Power Co. v. City of St. Louis*, language quite pertinent on this point:

“And these words in section 3367 ‘and such corporations shall have the power to lay conductors * * * with the consent of the municipal authorities thereof, and make such reasonable regulations as said authorities may prescribe,’ subject the right of the company to place appliances in the streets to the will of the legislative department of the city. This is the effect universally prescribed, we believe, to statutes relating to public corporations, if the franchise to place their appliances in public ways, instead of being directly granted in their charters (whether the charters be special acts or a general statute for incorporating companies), is left to the decision of the municipal legislative bodies. 3 Dillon, Mun. Corp. (5th Ed.), sec. 1226; 4 McQuillin, Mun. Corp., sec. 1629, p. 3406 and cases cited; *Southern Bell T. & T. Co. v. City of Richmond*, 103 Fed. 35, 37, 44 C. C. A. 147; *City of Chester v. Railroad*, 217 Pa. 402, 66 Atl. 654; *Suburban Light Co. v. Boston*, 153 Mass. 200, 26 N. E. 447, 10 L. R. A. 497.”

That there are cases in which municipalities have sought injunctive relief against utility companies and have been held estopped is true, and the principle applied is that stated in 3 Dillon on Municipal Corporations (5th Ed.), sec. 1194. There it is said:

“The author cannot give his assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes (citing *Brown v. Trustees of Schools*, 224 Ill. 184, 186, Cartwright, J.) But there is no danger in recognizing the principle of an *estoppel in pais* as applicable to exceptional cases, since this leaves the courts to decide the question not by mere lapse of time, but upon all the circumstances of the case to hold the public estopped or not as right and justice may require.”

As instances of facts held sufficient to justify the application of the doctrine of estoppel to the municipality, we cite here three cases, namely:

City of Mountain View v. Farmer's Telephone Exch. Co. (Mo.), 243 S. W. 157.

Bradford v. N. Y. & Pa. Tel. & Tel. Co., 206 Pa. St. 582, 56 Atl. 41.

People ex rel. v. Union Gas & Elect. Co., 254 Ill. 395.

The facts of these three cases are quite analogous and we quote from the Pennsylvania Supreme Court's decision on the sole question of estoppel:

"In the court's eighth conclusion of law there is a summary of material facts, which were fairly found from the testimony. They are that the borough of Bradford and the City of Bradford, its corporate successor, had permitted the defendants and their predecessors in ownership for more than twenty-one years to occupy the streets and highways of the said borough and city with poles and wires; that, without protest or objection, the borough and city stood silently by while the defendants were, during this period, making in good faith, an expenditure of from \$75,000 to \$100,000; that by numerous resolutions passed by both branches of council, and many of them duly approved by the mayor, consent had been given to the erection and the use of the poles, cross arms, etc., on the streets and highways of the city; that, for the privileges extended by it to the defendants, it had received a valuable consideration in the use of the poles for the carrying of the wires of its fire-alarm service; that it had received and duly receipted for license and pole taxes assessed against the defendants; that it had used the telephone instruments furnished by the defendants down to the date of the hearing in the court below; that it had by general ordinances regularly passed, approved and published, regulated the manner in which the poles should be regulated and placed; that a consideration to the city in extending privileges to the defendants was a reservation of 'the top-most gain' for police and fire alarm wires and that the city had permitted all the poles of the defendants to be erected under the direction of either the street committee of council, the street commissioner, or the city engineer. In view of this acquiescence in what at this late day, is complained of, a chancellor would unhesitatingly dismiss the bill, if the complainant were an individual. Ought any other rule to be applied to the city? * * *

In the present case, the acquiescence and the laches of the appellant (city) are clearly in the way of any equitable relief to it."

The facts plead by way of estoppel in *People ex rel. v. Union Gas & Elect. Co., supra*, are in substance such as appear in the Pennsylvania case, and the Supreme Court of Illinois held the plea sufficient and reversed the case for error in sustaining a demurrer to it.

Similar facts, in whole or in part to those appearing in the foregoing statement, are to be found in every case where the municipality was held to be estopped; and every such case was one for injunctive relief sought by the municipality against the utility company; in every case there are facts tending to establish an application in some form by the utility and a grant in some manner by the municipal council, board of trustees or assembly, who alone have the power to make such grant; an assumption in good faith of lawful authority to proceed by the utility and various ways of recognition thereof, by actual knowledge, tacit consent, acquiescence or affirmative action on the part of the municipality's legislative authority. The decision in every such case is to the effect that the municipality is now estopped by such facts to question the validity of a grant actually made by it, but in such irregular and defective form as in itself not to constitute a lawful grant.

No such facts operate to constitute estoppel in behalf of the American Telephone and Telegraph Company or the Chicago Telephone Company. The former company, although recognizing its legal obligation to apply for and obtain the consent of the proper corporate authorities as a condition precedent to its right to construct and operate a long-distance telephone system in the city, applying for that purpose and receiving ordinance grants from the Town of Lake and the Village of Jefferson therefor, no sooner obtained a foothold in these suburban towns than it began to project its poles and wires and stations into the City of Chicago; and continued its encroachments upon the city under guise of

local telephone operation until about the year 1910, when the true character of the American Telephone and Telegraph Company became revealed and known to the city authorities, to be that of owner of a complete long-distance telephone system, constructed, maintained and operated in the streets of the City of Chicago without any pretense of application for the consent of the corporate authority, the Chicago City Council, or recognition in any form whatever of any city official. And when immediate protest was made against this illegal status of the American Telephone and Telegraph Company, that company instead of adopting the plan prescribed by the law for legalizing its position in the city, sought ways and means by which it might continue its evasion of the laws of Illinois, its defiance of the city's power over its streets, and its refusal to pay just compensation for the use of the streets of the city; and to that end it entered into negotiations with the Chicago Telephone Company. It was therefore agreed between the two companies

“that the interests of all concerned will be best served by an arrangement which leaves in the Chicago Telephone Company the ownership of all the plant, consisting of poles, wires, conduits, cables and fixtures used in the long line business within the city limits.”

Thus the American Telephone and Telegraph Company becomes a self-confessed outlaw in the streets of the City of Chicago with its long distance telephone system, seeking to shield itself behind the Chicago Telephone Company and the latter company's ordinance grant of authority to conduct a local telephone exchange, by simply transferring to the local company the “empty legal shell” ownership of its long distance system in Chicago, while it continues as before, without franchise, license or permit, in the absolute and exclusive possession, use, control, domination, operation, enjoyment and benefit of that long distance system in the city's streets and in the exclusive enjoyment of the monopoly of the long distance telephone business of the City of Chicago.

The Chicago Telephone Company entered into this “arrangement” with full knowledge of the facts and of the pur-

pose involved. That company, knowing full well that its only authority was to operate a local telephone exchange, suddenly agreed, upon the inspiration of the American Telephone and Telegraph Company, to become the "owner" of a long distance telephone system *located entirely "within the city limits,"* just to enable the American company to say: "this company's lines are outside of the City of Chicago and connect with the lines of the Illinois Bell Telephone Company at points beyond the city limits."

These companies wantonly cut the American Telephone and Telegraph Company's long distance line in two, giving to the Chicago company the outlaw line located in the city and permitting the American company to retain so much of its line as did not cross the city's frontier; thereby making it impossible for either company itself to furnish long distance telephone service to the people of Chicago, but enabling the two companies by piecing their separate lines not only to furnish efficient service over the original complete long-distance system, but, as they thought, to do so without the city's consent to the use and occupation of its streets and alleys by either or both of said companies as required by law. By means of this hand-in-glove "arrangement" between them, the two telephone companies seek to evade the law, defeat the city's power over its streets and, in effect, defraud the city of the just compensation due for the use of its streets and reasonable fees for police supervision.

Such are the facts that are plead in equity in behalf of the telephone companies to estop the City of Chicago to terminate the usurpation of the city's streets and the illegal operations therein by the companies. Instead of constituting estoppel of the city these facts establish the proverbial unclean hands of the companies in a court of equity and also prove their persistent refusal to do equity as well as their continuing violation of the law. With such facts as clearly establish the wanton breach of both jurisdictional maxims of equity we believe the telephone companies in any case would themselves be estopped to plead estoppel against the City of Chicago.

As already noted the statute requires the consent of the city to be given by the "corporate authorities" and "this means the legislative authorities (City Council) acting by ordinance." *Holland Realty & Power Co. v. City of St. Louis, supra*. The Chicago City Council has taken no action whatever, by resolution or otherwise, to establish or recognize the right of the telephone companies or either of them to occupy the city's streets with a long distance telephone system. There is no action or inaction on the part of the City Council which can be held to warrant the application to the city of the equitable doctrine of *estoppel in pais*, and in the absence of such salient facts no court has ever held the municipality estopped to deny the continued usurpation or unauthorized occupation of its streets and public ways.

We know of no fact that might be relied upon by the telephone companies to support their plea of estoppel, except perhaps that in the reports of the Chicago Telephone Company to the Chicago City Comptroller of the receipts of the company as a basis for calculating the compensation to be paid by the company to the city, under section 3 of the Ordinance of November 6, 1907, *supra*, the company has included rentals paid by the American Telephone and Telegraph Company for the use of the offending long-distance telephone line. But this simple act of the City Comptroller, who is merely an administrative officer of the city, in passing as a basis for determining the compensation due from the local telephone company under its ordinance, an item of receipts growing out of the illegal status of the two telephone companies cannot operate to grant a vested easement in the city's streets to a telephone company which is otherwise an outlaw in the use and occupation of those streets. As was said in *Holland Realty & Power Co. v. City of St. Louis, supra*, and sustained by citation of numerous authorities,

"When consent to use a city's public ways can be obtained only from its own legislative assembly, and in a particular mode (in this case, by an ordinance as in Illinois), the administrative officers cannot waive the necessity of procuring consent from the assembly, and

in the prescribed mode. Neither can they by acquiescing in the use of a public way by a utility corporation, estop the city to terminate the use."

This is a salutary rule of law. Were it otherwise the designing corporations and utility companies could take from the unwary and unauthorized administrative official and keep by estoppel valuable rights and franchises that could not be secured in the one way prescribed by the law, and thus would the legislative acts of the State itself be nullified.

This rule against the application of the doctrine of estoppel to municipalities, generally applied by the courts of last resort of the country, has been uniformly recognized by the Supreme Court of Illinois.

People ex rel. v. Commercial Tel. & Tel. Co., 277 Ill. 265.

St. Louis A. & T. H. R. R. Co. v. City of Bellville, 122 Ill. 376.

Burton v. City of Chicago, 236 Ill. 383.

Chicago v. Oak Park Elevated R. R. Co., 261 Ill. 478.

The last case cited is squarely in point with the present case, in reports filed by the Telephone Company in the City Comptroller's office and payment accepted thereon, and the court in the case says:

"The city collector had no authority to bind the city without action by the City Council, and no action by the city collector was such as to bind the city. Someone in his office accepted the statements made by the officers of the plaintiff in error company and receipted for the amounts which the company chose to pay. If the City Council, with full knowledge of the facts, had authorized the acceptance of such fees as were paid in settlement of the controversy the situation would be different."

In *People ex rel. v. Commercial Telephone and Telegraph Company*, *supra*, where the issue of estoppel was raised, the court said:

"It is also urged that said village should be estopped from asserting its right to have plaintiff in error

ousted, for the reason that it acquiesced in and by its actions consented to the transfer from the Westfall Telephone Company to the plaintiff in error and to the occupation of its streets and alleys by plaintiff in error in the conduct of its telephone business. The record does not support this contention. The village did nothing, by any act or failure to act, to show that it acquiesced in the sale and transfer from the Westfall Telephone Company or in the occupancy of its streets and alleys."

When a party relies upon an estoppel as the basis of his claim of right, the alleged estoppel must be established by clear, precise, and unequivocal evidence.

Coal Belt Ry. Co. v. Peabody Coal Co., 230 Ill. 164.

See *People ex rel. Fitzhenry v. Union Gas Co.*, 254 Ill. 395.

XVI.

REMEDIES AND PROCEDURE.

In the following cases initial action was taken by the City Council, assembly, or trustees, condemning by resolution the unauthorized use and occupation of the municipality's streets and directing the authorities to remove the obstruction. Injunctive relief was sought against the threatened action and denied by the courts.

Michigan Telephone Co. v. City of Charlotte, 93 Fed. 11.

Western Union Telegraph Co. v. City of Toledo, 103 Fed. 746.

Cumberland Telephone & Telegraph Co. v. City of Evansville, 127 Fed. 187.

City of Mitchell v. Dakota Central Telephone Co., 246 U. S. 396.

Northwestern Telephone Exch. Co. v. City of St. Charles, 154 Fed. 386.

In the last case cited injunction was sought against the enforcement of a penal ordinance prohibiting the erection without the city's consent of any telephone, telegraph or

electric light poles. The ordinance was sustained and the injunction denied.

Injunction has frequently been granted municipalities to restrain the unauthorized use and occupation of their streets.

“Where the Legislature has expressly made the consent of the local authorities a condition precedent to the exercise of a franchise such local authorities may by injunction prevent the exercise of such franchise until such consent is obtained.”

26 C. J. 1046, sec. 122.

Note on page 297 of 11 Ann. Cas. 293.

City of Detroit v. Detroit City Ry. Co. et al., 60 Fed. 161.

Township of Bangor v. Bay City Traction Co., 147

Mich. 165, 110 N. W. 490, 7 L. R. A. (N. S.) 1187.

Dugdale Light & Power Co., 195 Mo. App. 243, 189 S. W. 830.

Franklin v. Nutley Water Co., 53 N. J. Eq. 601, 32 Atl. 381.

Quo warranto, or information in the nature of *quo warranto*, is the procedure most commonly invoked. In 26 C. J. 1047, sec. 125, it is said:

“The ordinary method of raising the question of the validity of a franchise, or of enforcing a forfeiture of it, is by *quo warranto* or *scire facias*, depending upon the local practice or statutes of the particular jurisdiction.”

2 Dillon Mun. Corp. (4th Ed.), Sec. 844.

Clark v. Interstate Independent Telephone Co., 72 Neb. 883, 101 N. W. 977.

Ashland v. Wheeler, 88 Wis. 607, 60 N. W. 818.

In Illinois the proceeding is statutory, the principal provision being:

“the Attorney-General or State’s Attorney of the proper county either of his own accord or at the instance of any individual relator, may present a petition to any court of record of competent jurisdiction, or any judge thereof in vacation, for leave to file an information in

the nature of a *quo warranto* in the name of the people of the State of Illinois; and if such court or judge shall be satisfied that there is probable ground for the proceeding, the court or judge may grant the petition and order the information to be filed and process to issue."

Cahill's Ill. Rev. Stat., 1923, Ch. 112, p. 2713.

The following Illinois cases sustain *quo warranto* as the proper procedure in this case:

People ex rel. City of Pontiac v. Central Union Telephone Co., 192 Ill. 307.

People ex rel. City of Chicago v. Chicago Telephone Co., 220 Ill. 238.

People ex rel. G. A. Shalberg, City Atty. v. Central Union Telephone Co., 232 Ill. 260.

People ex rel. Jas. A. Pearce, States Atty. v. Commercial Tel. & Tel. Co., 277 Ill. 265.

Although these cases sustain *quo warranto* as the proper procedure under the Illinois statute, they also hold that the rights and privileges granted to telephone and telegraph companies by a municipality are not franchises, but merely licenses.

Because this holding is not in accord with the great weight of authority, is contrary to the rule of the Federal Courts, and is made the basis for the contention that *quo warranto* is not the proper remedy in behalf of the municipality, we deem it necessary briefly to give consideration to it here.

In *State of Missouri ex rel. Kansas City v. East Fifth St. Ry. Co.*, 140 Mo. 539, 38 L. R. A. 218, page 220, it is said:

"Defendant's contention is that *quo warranto* is not the proper remedy in this case; that the state has no interest in this controversy; that the 'franchise' granted by it, and the only one that it is interested in, is not the subject matter of this litigation; that the questions involved are of a personal nature, between the relator on the one hand, and the defendant railway company on the other; the relator alleging failure to comply with the

terms and conditions of a contract between it and defendant, and the defendant denying non-compliance and pleading estoppel,—a question that can be fully settled by a court of chancery in an action brought by the relator against the defendant. Upon the other hand, it is claimed that there is a difference between the charter and a franchise independent of it, and that this proceeding is based upon that distinction. In the case of *Memphis & L. R. R. Co. v. Berry*, 112 U. S. 619, 28 L. Ed. 841, the court says:

“ ‘The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the incorporators, while the powers and privileges vested in and to be exercised by the corporate body as such are the franchises of the corporation.’ ”

After considering other cases and citing many more the court in this case refers to *Mayberry v. Mutual Gaslight Co.*, 38 Mich. 154, and *Bellville v. Citizens Horse Car Co.*, 152 Ill. 171, with the comment that “these cases we think not in line with the great weight of authority.”

Mr. Justice Hughes in *N. Y. Elec. Lines Co. v. Empire City Subway Co.*, 235 U. S. 179, p. 192, renders an opinion in part as follows:

“Thus in *Gheer Northern Union Gas Co.*, 158 N. Y. 510, 513, referring to the legal effect of the consent of the municipal authorities under a statute empowering the corporation to lay gas conduits in streets, on such consent, the court said: ‘It operates to create a franchise by which is vested in the corporation receiving it a perpetual and indefeasible interest in the land constituting the streets of a municipality. It is true that the franchise comes from the State, but the act of the local authorities, who represent the State by its permission and for that purpose, constitute the act upon which the law operates to create the franchise.’ And in *Louisville v. Cumberland Telephone Co.*, 224 U. S. 649, 659, where a corporation was authorized to erect poles, etc., over the streets with the consent of the General Council of the City, it was held that the charter franchise became fully operative when the city’s consent was obtained. ‘Such a street franchise has been called by various names—an

incorporeal hereditament, an interest in land, an easement, a right of way—but, howsoever designated, it is property.’ 224 U. S., p. 661. Again in the recent case of *Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58, 65, it was said: That an ordinance granting the right to place and maintain upon the streets of the city poles and wires of such company is the granting of a property right, has been too many times decided by this court to need more than a reference to some of the later cases.”

Notwithstanding the holding of the Illinois Supreme Court, in conflict with the weight of authority and the Federal Courts, that the legislative grant to a telephone company of the right to erect its poles, etc., in the streets of the city with the city’s consent is a mere license, and the consequent contention that *quo warranto* is therefore not a proper remedy, the Supreme Court decided against that contention in the cases of *People ex rel. City v. Chicago Telephone Co.*, 220 Ill. 238, and *People ex rel. State’s Atty. v. Commercial Tel. & Tel. Co.*, 277 Ill. 265. In the former case it is said:

“So far as the information questions the right of the defendant to continue in the occupation and use of the streets held by the City of Chicago in trust for the general public, and to exercise its function therein, the proceeding involves a matter of public right, as to which the people have no other legal remedy. The license or privilege to occupy the streets is not a franchise, but it can only be granted in pursuance of legislative authority and the right to hold or exercise the license or privilege may be questioned by an information in the nature of a *quo warranto* on the ground that it has been granted improperly or without warrant of law or that it is so held or exercised. *Swarth v. People*, 109 Ill. 621; *Martens v. People*, 186 *id.* 314.”

The latter case, *supra*, after using substantially the same language in holding that *quo warranto* will lie, concludes with the statement that:

“Such a proceeding is properly brought by the public prosecutor either of his own accord or at the instance of any individual whom he may name as relator. *People v. North Chicago Ry. Co.*, 88 Ill. 537.”

We believe a complete and proper adjudication of all the issues involved in the case makes both telephone companies highly proper if not actually necessary parties to any *quo warranto* proceeding. We believe either the American Telephone and Telegraph Company or the Illinois Bell Telephone Company might plead such facts as would entitle it to intervene. As indicated by the reply of Mr. W. E. Bell, Divisional Superintendent of the American Telephone and Telegraph Company, that company's plea will be that it has no lines in the streets of the City of Chicago; that its lines connect with those of the Illinois Bell Telephone Company outside the city limits. It has lines, however, by lease or "arrangement" with the Illinois Bell Telephone Company, and although it sold this long distance line located in the City of Chicago to that company, it never ceased its use of that line for its long-distance business. The American Telephone and Telegraph Company frankly states it has no franchise; it assumes to operate now in virtue of its said agreement with the Illinois Bell Telephone Company and that company's franchise grant under the ordinance of November 6, 1907, which authorized the Chicago Telephone Company to establish and operate a local telephone exchange.

The joining of all parties involved in the situation is clearly contemplated by the *quo warranto* statute. Thus section 1 provides that,

"When it appears to the court or judge that the several rights of divers parties to the same office or franchise, privilege, exemption or license, may properly be determined on one (1) information, the court or judge may give leave to join all of such persons in the same information, in order to try their respective rights to such office, franchise, privilege, exemption or license."

Cahill's Ill. R. S., 1923, Ch. 112, p. 2713.

In the case of *People ex rel. Louis Fitzhenry v. Union Gas and Electric Co.*, 254 Ill. 395, a *quo warranto* proceeding, "the petition for leave to file the information states that the Attorney General is informed that the Union Gas and Electric Company claims a right of use in and to the streets of

the City of Bloomington by virtue of some alleged arrangement between it and the Citizens Gas Light and Heating Company, a corporation which formerly did business in the City of Bloomington; also by reason of some arrangement between itself and a corporation known as the Bloomington Gas Light and Coke Company, both of which corporations, it is alleged, *have been out of existence* for many years.” (Much of this form is applicable to the present case.) Since the Illinois Bell Telephone Company, with which the American Telephone and Telegraph Company has the arrangement, *is in existence*, it should be made a party to any *quo warranto* proceeding against the American Telephone and Telegraph Company.

CONCLUSION.

A telegraph or telephone company cannot occupy or use public streets or highways without legislative authority granted either directly or indirectly.

37 Cyc. 1617, Par. c.

The American Telephone and Telegraph Company has never so much as deigned to recognize the State of Illinois or the City of Chicago in any manner to obtain the authority to construct and maintain the long-distance telephone system in the city's streets which it now pretends to have transferred to the Illinois Bell Telephone Company; and neither the latter company nor its assignor, the Chicago Telephone Company, has ever obtained a license to purchase and operate the American Company's outlaw long-distance line in Chicago, either for itself or to enable the American Company to continue its use and operation of that line in the city's streets without legislative authority.

It has frequently been said by the United States Supreme Court of companies chartered by the Federal Government, that “it never could have been intended by the Congress of the United States, on conferring upon a corporation of one State the authority to enter the territory of any other State

and erect its poles and lines therein, to establish the proposition that such company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportions of the taxes necessary to its support.”

Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530, 548.

St. Louis v. Western Union Telegraph Co., 148 U. S. 92, 100.

And yet this is what the American Telephone and Telegraph Company, in its might and independence, is seeking to do. It palpably evades, if necessary, defies, the State and municipal governments by refusing to obtain the legislative authority for the use and occupation of the city's streets, without which it would be impossible to conduct its long-distance telephone business in the City. The evasion and subterfuge resorted to now is that the Chicago Telephone Company or its assignee, the Illinois Bell Telephone Company, owns and operates the only *long-distance telephone system in the City of Chicago*, although the longest long-distance telephone message possible for the latter company to transmit is from city limits to city limits, and although all the receipts of the enormous long-distance business of the City of Chicago is governed by the American Telephone and Telegraph Company, and that company is able to allow, and the local company is compelled to accept, the munificent participation in said receipts of 17c on each outgoing message, notwithstanding the courts have held that the customary and reasonable allowance is at least 25c on long-distance messages.

Thus, in effect, is the City of Chicago defrauded of three legitimate sources of revenue: (1) compensation for the use and occupation of its streets, alleys and public grounds; (2) reasonable charges or fees for the city's police supervision; and (3) at least one-third of the commission payable under the ordinance by the local company on receipts from the long-distance toll business in the City.

If the present ways and means adopted by the American Telephone and Telegraph Company for operating its long-

distance telephone system should be recognized, then will that company have succeeded in defeating the law of the State which requires grant of legislative authority for such operation and consent of the municipality for the use and occupation of its streets, as well as payment of compensation therefor. Then may the local telephone exchange company of the city do what the Supreme Court of Illinois held a local or street railway company could not do, that is, meet the suburban or commercial railroads at the city limits and carry their cars and transport their passengers and freight over the local street railway lines into the city, and thus as the court said in that case:

“the power to determine when, where and in what manner (long distance telephone) lines should enter a city, traverse its thoroughfares with (long-distance telephone business) would be lodged, in great part, not in the city authorities, but in the (local telephone exchange company) in every city where a (local exchange) company is rightfully operated.”

City of Aurora et al. v. Elgin, Aurora and Southern Traction Co., 227 Ill. 485, page 500.

Whatever may be the policy adopted with respect to litigation to force compliance with the law by the telephone companies and to secure to the City such rights and revenue as it is justly entitled to, and whatever may prove to be the outcome of such litigation, we believe it quite possible for the City hereafter to obviate the recurrence of such a situation as here exists, and to fully secure, conserve and protect all its rights and powers by adopting a new ordinance upon the expiration of the present ordinance of November 6, 1907, which is to expire January 8, 1929.

The new ordinance should take care to recognize the material distinction between the local telephone exchange to be thereby authorized and the long-distance telephone system; the grant to the local company should be explicitly limited to the construction, ownership and operation of a local telephone exchange exclusively in and for the City of Chicago; that such company is not to engage in any manner, either for

itself or for any other company, in the long distance telephone business proper, except in the usual and customary way of receiving at and transmitting from its own local central exchange in the city long-distance messages for long-distance telephone companies actually established and located in the City of Chicago; that under no circumstances or conditions is the local company to construct, purchase, own or lease, to be operated either for itself or for another company, any long-distance telephone wire or line, for the purpose (as now) of receiving from or transmitting to, a long-distance station of any long-distance telephone company located outside the city limits.

In this manner may the City of Chicago successfully cope with the great American Telephone and Telegraph Company in its present attitude and hand-in-glove "arrangement" with its subsidiary and subservient local telephone company.

Respectfully submitted,

FRANCIS J. VURPILLAT,
Assistant Corporation Counsel.

(Note: The foregoing opinion was adopted by the Corporation Counsel and transmitted to Hon. John S. Clark, Chairman of Committee on Gas, Oil and Electric Light.)

Liability of City in Using the Lutz Paving Machine— Infringement of Patent.

August 1, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

My dear Commissioner:

On May 21, 1924, you addressed a communication to this Department requesting an opinion as to the liability of the City, if any, in using the Lutz Paving machine in the face

of notice served upon you by the Asphalt Pavement Retreading Company.

This being a matter involving a special question of patent law, it was referred to Messrs. Dyrenforth, Lee, Chritton & Wiles, patent attorneys, and under date June 9th I have received from them the following communication, which is adopted as the opinion of this Department:

Hon. Francis X. Busch,
Corporation Counsel,
City Hall,
Chicago, Ill.

Dear Mr. Busch:

Re: Lutz Patent 1184546:

Delay in replying to your letter of May 22d, with the enclosures, has been occasioned by our inability to obtain a copy of the contract referred to in the notice of May 3, 1924, from the Asphalt Pavement Retreading Company, served upon the City. We have now obtained copies of the contract mentioned in said notice, and we are returning herewith the copy of the notice in question which had been served upon the City, the letter from Col. Sprague to you, dated May 21, 1924, and the copy of the opinion of Hervey S. Knight, of Wilkinson, Huxley, Byron & Knight, dated May 7, 1924, all of which accompanied your letter of May 22, 1924.

In addition to examining the Lutz patent 1184546 of May 23, 1916, Apparatus for Heating Street Pavements, we have been furnished with a copy of the Blake, Lutz & Hubbell patent, No. 805337, November 21, 1905, and of the Lutz patent No. 839071, issued December 18, 1906, referred to in the opinion of Mr. Knight, in which it is stated that this latter patent which would have now expired anyway, had been held invalid in *Equitable Asphalt Maintenance Company v. Parker-Washington Company*, 197 Fed. 920, as well as the contract of February 19, 1923 (mentioned in the notice to the City of Chicago of May 3, 1924), and the contract of May 26, 1922, which is referred to in that contract.

We have also conferred with Mr. Knight and with Mr. Lutz relative to this entire transaction, and we now advise you as follows:

1. *The contract relations between the parties:*

The contract of February 19, 1923, which the City of Chicago is charged with violating, is merely an instru-

ment entered into between George H. Lutz, the then owner of the patent here involved, and what purport to be the trustees of the Asphalt Pavement Retreading Company, a Common Law Trust. This provides for the assignment of the Lutz patent here involved, No. 1184546, to the Trustees (and we are advised that the assignment has been made), in consideration of the payment of \$57,682.84. For most of this money the said Common Law Trust gave its promissory notes, none of which have been paid.

A bill was filed in the Circuit Court of Cook County, Illinois, on May 28, 1924, Gen. No. B-97941, by the Asphalt Pavement Retreading Company, an Illinois corporation, which had succeeded to the rights of the Common Law Trust of the same name, with reference to the patent here involved for the purpose apparently of preventing Mr. Lutz from transferring or hypothecating the notes given him for the patent, and for the purpose of having said notes cancelled. This suit is still pending, we are informed, and no steps have been taken by either side to have the same disposed of. We are also informed that the corporation in question and the Common Law Trust by the same name have no funds and are so financially involved that they probably can do nothing further in this connection. It seems that a substantial amount of stock in the Illinois corporation was sold, without having obtained the approval of the Illinois Securities Commission, and this money has been spent; the net result is that the promoters of this company are being threatened with prosecution, and are being pressed to repay the money which was thus obtained from these improper stock sales.

However this may be, the Asphalt Pavement Retreading Company is now in a position to charge infringement of the Lutz patent No. 1184546, though we do not think there is anything in the contract relations between the parties which need concern the City of Chicago except to the extent as the contract relations purport to place the Asphalt Pavement Retreading Company in a position to sue the City of Chicago for the alleged infringement of the Lutz patent. Other than that, you may disregard the contract of February 19, 1923.

2. *The Lutz Patent.*

We have not seen one of the machines which the City of Chicago is using, but we have conferred with

Mr. Knight and with Mr. Lutz, who are familiar with this construction. Assuming what they say to be true, it seems to us you may safely rely on the opinion of Mr. Knight with reference to the question of infringement and conclude that the patent is not infringed.

If you have read the second paragraph on page 3 of Mr. Knight's opinion, you will see the theory on which he concludes there is no infringement. It would seem also from what Mr. Knight says, in view of the two prior patents referred to in his opinion, that this Lutz patent 1184546 is probably not valid. For this reason also, it would seem the City of Chicago is reasonably safe in proceeding with the use of the machine in question.

3. *Protection to the City.*

Even though Mr. Knight has concluded the patent is invalid or, if valid, is not infringed, the City is subjected to the liability of an infringement suit, which means annoyance, expense and trouble to defend, even though a victory ultimately results for the City.

Inasmuch as the City is now asked to purchase and use machines which it is charged infringe the Lutz patent 1184546, we suggest that you obtain from the contractor who furnishes these machines to the City of Chicago, a good and sufficient bond, preferably with a surety company thereon, conditioned to indemnify the City against any loss, expense or damage in any way arising out of the use by the City of Chicago of these machines. This bond should not only cover all expenses occasioned to the City arising out of the defense of any infringement suit or suits which may be brought against it, on this account, but should also specifically provide for the payment of any amount which the City of Chicago may be required to pay as profits or damages arising out of such infringement.

Should the patent be held valid, and the City found guilty of infringement, an accounting will follow in which the City would be obliged to pay whatever savings it effects by the use of the infringing part of these machines, and also such damages as might be occasioned thereby. Of course, the bond should cover the attorney's fees, Master's fees, etc., which the City might incur by reason of such infringement suit or suits.

For your convenience we are handing you herewith copies of the following three United States Letters Patent:

805337, Nov. 21, 1905, Blake, Lutz & Hubbell, Machine for Heating Surfaces.

839071, Dec. 18, 1906, Lutz, Machine for Heating Surfaces.

1184546, May 23, 1916, Lutz, Apparatus for Heating Street Pavements.

Yours very truly,

DYRENFORTH, LEE, CHRITTON & WILES,
By George A. Chritton."

The documents referred to in the opinion quoted are attached hereto.

Very truly yours,

FRANCIS X. BUSCH,
Corporation Counsel.

City Has No Power To Enact Speed Regulations of Vehicles.

August 1, 1924.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

You have transmitted to this department a communication which you received from the Illinois Automobile Club stating that there is a Supreme Court ruling that the ordinance relative to crossing street car tracks at a rate of speed more than ten miles per hour is unconstitutional, and you have requested our advice in the matter. The statement of the attorney for the Illinois Automobile Club is correct. It is provided in Section 26 of "An Act in Relation to Motor Vehicles," approved June 30, 1919, in force January 1, 1920, that no city, town or village shall have the power to pass any ordinance limiting or restricting the speed of motor vehicles. The speed of all motor vehicles within all parts of the State, including the jurisdiction of all cities, is regulated by State statute, and consequently any ordinance of the City which purports to regulate speed is void. This was so held in the case of *Healy v. Adams Express Co.*, 300 Ill. 340.

Section 3823 of the Chicago Municipal Code of 1922 provides as follows:

"2823. *Vehicles approaching boulevards and car lines.*) It shall be unlawful for any person, firm or corporation driving or operating any vehicle propelled by animal or other power upon the public streets or alleys of the city to drive or cause same to be driven onto any boulevard, or onto any driveway or roadway of any boulevard within the limits of the city without first bringing such vehicle to a full and complete stop. And it shall be unlawful for any person, firm or corporation driving or operating any motor vehicle, motor truck or motorcycle upon any public street or alley in the city to drive or cause such vehicle to be driven at a speed of more than ten miles per hour onto or across any other street within the limits of the city on which a street car is operating. Any person, firm or corporation violating any of the provisions of this section shall be fined not less than one dollar nor more than two hundred dollars for each offense."

The City of Chicago has power to require an automobile to stop before being driven on to any boulevard. Therefore the first sentence of said Section 3823 is valid. The second sentence of Section 3823, since it is a speed regulation, is invalid. We are of the opinion that the validity of the first part of Section 3823 is not affected by the invalidity of the second part of said section.

It is therefore our opinion that that portion of Section 3823 which requires automobiles to be stopped before being driven on to a boulevard is valid, and should be enforced. We are further of the opinion that that portion of Section 3823 which provides that automobiles should not be driven at a greater speed than ten miles per hour on to or across any street in the City on which a street car is operating is invalid, and should not be enforced.

Respectfully submitted,

ALBERT H. VEEDER,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Enforcement of Private Detective Ordinance Pending Amendment of Same.

August 1, 1924.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

You have transmitted to this department a letter from Alderman John A. Lyle, Chairman of the Judiciary Committee of the City Council, concerning the ordinance regulating private detective agencies and the collection of license fees from them.

We have examined the communication from Alderman Lyle and find that he states that the Judiciary Committee is at present redrafting the ordinance regulating private detective agencies, and in view of that fact, suggests that the City do not take any steps to enforce the same.

The City is granted full and complete power to tax, license and regulate detective agencies and private detectives by Section 91 of Article V of the Cities and Villages Act. The present ordinance licensing detective agencies is comprised within Sections 1029 to 1047 of the Chicago Municipal Code of 1922. We have examined said ordinance and it is our opinion that the same is valid. Although there are some sections which are not clear, and although there are some grounds upon which an attack against the validity of said ordinance might be predicated, nevertheless, it is our opinion, that the ordinance can be successfully defended in its present condition. Therefore, we see no reason, nor is any reason stated in Alderman Lyle's communication, why the said ordinance should not be enforced up to the time that a new one is substituted.

Very respectfully,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Step-Children of Municipal Employee Injured in Performance of Duty Not Entitled to Disability Benefit.

August 1, 1924.

BOARD OF TRUSTEES OF MUNICIPAL EMPLOYEES ANNUITY AND
BENEFIT FUND.

Gentlemen:

Replying to your request for an opinion as to the right of Henry Mikkelsen, a bridge and structural iron worker in the Bureau of Engineering, Construction Division, P. R. No. 3276, to a child's disability benefit under Section 46 of the act relative to the Municipal Employees Annuity and Benefit Fund of Chicago, the following is submitted:

Section 46 of the act provides that "child's disability benefit" shall be provided for municipal employes in the service who shall become disabled as a result of injury incurred in the performance of any act or acts of duty, provided such child shall be the issue of such municipal employe and shall be less than eighteen (18) years of age, and provided that the total amount of such child's disability shall not exceed fifteen per cent of the salary of such municipal employe.

The records show that Mr. Mikkelsen was injured May 10, 1924; that at the time of his injury he had two step-children, but no issue of his body. Mr. Mikkelsen's right of duty disability benefit and child's disability benefit is fixed as of his status at the time of his disability.

As it does not appear that Mr. Mikkelsen had any child the issue of his body under eighteen (18) years of age at the time he became disabled, I am of the opinion that Mr. Mikkelsen is not entitled to a child's disability benefit.

Yours respectfully,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Frontage Consents to Erect Billboard Not Acted Upon
for One and One-half Years Are Invalid and
Permit May Not be Issued.**

August 2, 1924.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir :

We have your letter of July 30th, transmitting certain frontage consent petitions and a report of the verification of such frontage consents by the Bureau of Maps and Plats, and asking for a legal opinion relative to the issuance of a permit to the Thomas Cusack Company for the erection of a bulletin board on Sheridan road (Devon avenue) between Broadway and Lake Michigan.

The letter of the Superintendent of Maps showing the verification of said frontage consents is dated December 30, 1922, and due consideration being given to the care exercised by the Bureau of Maps and Plats in such matters, it cannot be doubted that the frontage consent petitions submitted constituted full compliance with the city ordinance concerning billboards and signboards (Section 915 of The Chicago Municipal Code of 1922) as of that date. However, your letter states that the company has not heretofore taken advantage of such frontage consents and that it has not heretofore built any signboard or billboard on said block, but that it is now (more than one and one-half years after the verification of said frontage consents) making application for a permit to erect a bulletin board thereon. The question proposed for our opinion is whether said company, on the facts above stated, is entitled to a permit at the present time.

Where frontage consents are required by statute or ordinance before the issuance of a permit or license, the procura-

tion of such consents in the manner by law prescribed, is jurisdictional to the right or authority of the officer or officers to issue such license or permit. *Beeson v. City of Chicago*, 75 Fed. 883; *McCartney v. Chicago and Evanston Railroad Company*, 112 Ill. 611; *McGann v. People*, 194 Ill. 526; *Hickey v. Chicago and Western Indiana Railroad Company*, 6 Ill. App. 172. The issuance of a permit through error or otherwise before sufficient frontage consents have been procured creates no right in the person to whom such permit is issued, but the same is wholly void and of no effect. *Snyder v. City of Mt. Pulaski*, 176 Ill. 397 (see also cases above cited).

The right of the person obtaining such permit to do the act or to establish and maintain the structure, establishment or business thereby licensed is made by the police laws of the City, to depend upon the consent of the property owners in the neighborhood affected being first had and obtained. Such property owners, in a sense, represent the general public and their consent in the manner prescribed by law is taken as evidence that the performance of the act or maintenance of the business or structure thereby licensed will not be detrimental to the public welfare. *Doane v. Chicago City Railway*, 160 Ill. 22; *People v. Griesbach*, 211 Ill. 35; *Theurer v. People*, 211 Ill. 296. The purpose of frontage consent petitions and the verification thereof is to afford to the officer or body charged with the duty of issuing such licenses or permits reasonable evidence that such property owners do consent, *at the time such license or permit is granted*, to the performance of whatever act or to the erection and maintenance of whatever building, structure or establishment is thereby licensed.

The signing of a frontage consent petition is not an irrevocable act, and any property owner so signing may withdraw his signature at any time before the petition is finally acted upon by the officer or body to whom it is addressed and before such permit or license is duly issued. *Littell v. Board of Supervisors*, 198 Ill. 205; *Theurer v. People*,

211 Ill. 296; *Kinsley v. Pogue*, 213 Ill. 302; *Mack v. Polecat Drainage District*, 216 Ill. 56; *Boston v. Kickapoo Drainage District*, 244 Ill. 577; *People v. Decatur, Springfield and St. Louis Railway Company*, 120 Ill. App. 229. Although we have been unable to find any case directly in point, we think, on principle, that such frontage consents are also revoked by implication where by conveyance or descent the title and property of one who signed such a petition has been transferred to another not a signer thereof before such petition has been acted upon.

We are therefore of the opinion that when frontage consent petitions and a verification thereof are filed with an officer having authority to issue permits, as the basis for a permit, and from the date of the verification of such petitions it appears that considerable time has elapsed since such frontage consents were secured—such time in fact that the conditions existing when said frontage consents were obtained may have been substantially altered before the applications for such permit—such officer before issuing said permit should take whatever steps seem necessary and reasonable to assure him that property owners, representing sufficient frontage to satisfy the ordinance or statute, are consenting thereto at the time such permit shall be issued.

We return herewith the frontage consent petitions and letter of verification submitted with your letter.

Very truly yours,

C. M. DOTY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Permit to Gas Co. to Lay Pipes in Streets—Illinois
Commerce Commission—Assessments for Replac-
ing of Pavement—Damages From Explosion
—Police Power of City Over
Pressure in Pipes.**

August 2, 1924.

HON. JOSEPH O. KOSTNER, Alderman, 23d Ward.

Dear Sir:

We have your letter of July 30, 1924, relative to permits issued to the Peoples Gas Light & Coke Company for the laying of gas mains in Keeler avenue. Most of the questions asked in your letter relate to the practice of the Department of Public Works in respect to inspections or to the engineering necessities of such a work as that now being carried on by the Gas Company and are not legal questions. We understand that the Department of Public Works will prepare a reply to such questions and we have therefore confined our attention to such questions as are legal questions.

The first question asked reads as follows:

“One (1). Was the permit issued to the Peoples Gas Light and Coke Company a permit of necessity directed to the City of Chicago by the Public Utilities Commission?”

Permits issued to the Peoples Gas Light and Coke Company are issued under the authority of a Special Ordinance passed August 30, 1858, which authorized that company to lay its pipes and mains in the streets and public places of the City of Chicago then existing or thereafter created. We do not know whether the Gas Company has also secured a certificate of convenience and necessity from the Illinois Commerce Commission in respect to the enlargement of its plant, but in any event such certificates, if issued, would not command the actions of the City of Chicago or the Commissioner of

Public Works in any way. If issued, such certificates would be granted to the company in its capacity as a public utility company and would relate to the enlargement of its plant only.

Question four is as follows:

“Four (4). Could the people refuse to pay the four installments for paving of Keeler avenue, their pavement having been torn up?”

We are of the opinion that the duty of the people assessed to pay assessments on account of the paving of Keeler avenue and the duty of the Gas Company to restore the paving in any street which may be torn up on account of the installation of gas mains are entirely different and that said question four must be answered in the negative.

The said ordinance of August 30, 1858, granting permission to the Peoples Gas Light and Coke Company to use the streets and public places of the City authorized it to lay gas mains, pipes, feeders and service pipes and placed no restrictions upon the exact nature of such pipes. We do not conceive it possible that the company would undertake to install a gas reservoir in the public street, but we see no reason why it might not install in such streets pipes intended to connect reservoirs as well as for any other legitimate purpose in respect to its business.

In respect to question thirteen, which is as follows: “Thirteen (13). In case of an accident, explosion, etc., who assumes the responsibility and pays the damage done to persons and property? These pipes are tested to fifty pounds pressure.” Said ordinance of August 30, 1858, provides that: “Said company shall be liable for all damages which may result from or by reason of opening or incumbering any street, alley or sidewalk in said City of Chicago.”

We think such provisions, together with the general principles of tort law which would impose upon said company all the usual responsibility imposed upon any company for the negligence of its agents or servants or the defects of its

properties and instrumentalities, sufficiently answers question thirteen.

With respect to question fourteen:

“Fourteen (14). What jurisdiction has the City over the pressure in pipes?”

We think such jurisdiction would arise from the general police powers of the City and that the City may provide for whatever inspections or other supervision is necessary to protect the public safety.

The rest of the questions asked in your letter we believe will be more properly answered by the Department of Public Works.

Very truly yours,

C. M. DOTY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Maintenance of Metal Boxes Affixed to Posts and Poles on Streets for Purpose of Vending Newspapers.

August 4, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

You have transmitted to this Department certain correspondence which has taken place between your Department and the Herald and Examiner relative to the power and authority of the City to require the removal of certain metal boxes which the Herald and Examiner has attached to various posts and poles throughout the City. This office has also been requested to render you an opinion as to whether the said devices can lawfully be removed and as to the proper procedure to effect the removal of the same.

It appears that the Herald and Examiner has caused metal boxes for the purpose of selling newspapers to be attached to various poles and posts throughout the City of Chicago. No permission has ever been secured or even solicited from the City Council or any city official to do this. These boxes are painted with an aluminum paint; in size they are about 12 by 14 by 4 inches. On the outside of the same is painted in black paint the words, "Herald and Examiner." Each box contains a number of newspapers, and the public are instructed to place three cents in the receptacle on the side before procuring a newspaper. Thousands of these boxes have been placed on the streets or sidewalks of the city, most of them being attached either to the City poles which bear the names of the streets, or to the poles of the street car companies which carry the trolley wires.

The Supreme Court of Illinois, in a continuous line of decisions, has frequently laid down the broad general principle that the City has no power or authority to grant any use of its streets to any individual for any private purpose, but must hold and control the possession exclusively for public use, for the purpose of travel and the like.

In the case of *Hibbard & Company v. City of Chicago*, 173 Ill. 91, the City Council had passed an order issuing a permit to Hibbard, Spencer, Bartlett & Co. to erect an awning over a city street. The court held that the Commissioner of Public Works was justified in removing the same after notice to the owner, and in the course of its opinion said:

"The public streets of a city are dedicated to the public for public use and are subject to the control and management of the city council, but that body has no power to alien or otherwise encumber such streets so long as they are public streets, but must hold them in trust for public uses only. The municipal corporation can grant no easement or right therein not of a public nature, and the entire street must be maintained for public use, hence no individual or corporation can acquire any portion of the street for exclusive private use to the exclusion of the public. The city council has no

power to grant such use. (*Field v. Barling*, 149 Ill. 556.) Whilst it may grant individuals or corporations a temporary use for such time and in such way as not to interfere with public use, yet there is no power in the municipality to sell or grant for private use a public street and exclude the public therefrom. (*City of Quincy v. Jones*, 76 Ill. 231.) A permanent encroachment upon a public street for a private use is a purpresture, and is, in law, a nuisance. Wood on Nuisances, Secs. 260, 262, 251; *Driggs v. Phillips*, 103 N. Y. 77; *Attorney General v. Heishon*, 18 N. J. Eq. 410; *Smith v. State*, 23 N. J. L. 712; *State v. Woodward*, 24 Vt. 92; *State v. Atkinson*, id. 681; *Chamberlain v. Enfield*, 43 N. H. 356; *Commonwealth v. King*, 13 Mete. 115."

In the case of *Pennsylvania Co. v. City of Chicago*, 181 Ill. 289, the court, at page 296, said:

"The title of the streets is vested in the city, and it has the conservation, control, management and supervision of such trust property, and it is its duty to defend and protect the title to such trust estate. The city has no power or authority to grant the exclusive use of its streets to any private person or for any private purposes, but must hold and control the possession exclusively for public use, for purpose of travel and the like. (*Field v. Barling*, 149 Ill. 556; *Hibbard & Co. v. City of Chicago*, 173 id. 91; *Barrows v. City of Sycamore*, 150 id. 588; *Ligare v. City of Chicago*, 139 id. 46.) The rule is, that all public highways, from side to side and from end to end are held for the use of the public, and no other safe rule can be adopted."

In the case of *The People v. Clean Street Co.*, 225 Ill. 410, the City Council of the City of Chicago by ordinance had authorized certain city officials to enter into contracts with private individuals to place receptacles upon the streets of the city for the deposit of waste papers, etc. The contracts entered into authorized the use of the exterior of the receptacles for advertising purposes. The court held that regardless of whether the boxes constituted a nuisance or obstruction to the streets, it was unlawful, and the City had no authority in law to allow any private persons to make a profit out of a street use. The court, in quoting from the case of *State v. City of St. Louis*, 161 Mo. 371, said, at page 482:

“ ‘But there is another view to be taken of this ordinance. It subjects the public streets to a purely private purpose, to-wit, the advertising of the individual business and enterprise. Can the city devote its streets to such purpose? We hold that it cannot. The charter gives the city power to regulate the use of the streets. Under this grant it may, it is true, not only regulate the travel thereon, but it may allow gas, water and sewer pipes to be laid therein and permit telegraph and telephone poles to be erected therein. But all of these uses are consistent with the use for which they are dedicated or condemned. * * * Referring now to the ordinance, it will be observed that it confers upon Belt the exclusive right to place advertisements on such boxes for the benefit of himself and his assigns. In a word, the city has attempted to farm out its sidewalks and streets to a private person for advertising. Belt is free to make his own charges for advertising. No power is reserved in the city, even if it were a purpose to which it could devote the streets, to regulate the charges for advertisements. * * * But it is said that it is no objection to a public franchise that its owner may derive a private gain therefrom. This is unquestionably true when the use is public and the gain arises out of that use, such as street cars, telegraph and telephone lines. In this case, however, the pecuniary profits to Belt arise from a source wholly distinct from any public use. They will not flow naturally from his right to erect and maintain boxes for waste paper, but solely from a distinct privilege in which the public are not interested, to-wit, his exclusive right to use the streets for advertising purposes, and purely provide a collateral enterprise. We are clear that the streets cannot be devoted to such a private purpose.’ ”

The only question which might arise under the facts in the present matter, is whether the placing of receptacles by a newspaper for the purpose of selling papers upon the public streets, constitutes a public use. We believe there can be no question but that it does not constitute such a use. It amounts to a privilege granted to a private individual and from which he derives a profit. Were this not the law, then every newspaper would be entitled to place its boxes upon the streets for the sale of its newspapers. Not only this, but

there would be just as much reason for allowing automatic vending machines, such as slot machines, machines to sell cigarettes or candy, etc. Not only would the appearance of the streets be spoiled, but the receptacles and devices would be so numerous as to constitute an actual obstruction.

Not only is it true that the City would have no power to grant the placing of such devices upon the public streets or sidewalks, but the ordinances of the City of Chicago expressly make it unlawful to affix such devices upon any poles within the city.

Section 3735 of The Chicago Municipal Code of 1922 provides as follows:

“3735. Unlawful to maintain stands, troughs, racks, platforms, etc.) It shall be unlawful for any person, firm or corporation to erect, place or maintain in, upon or over any street, alley, sidewalk or other public place in the City of Chicago, any fruit stand, lunch stand, lunch wagon, flower stand, bulletin board, trough for feeding horses, or any table, box, bin, rack, showcase, platform, or any other arrangement or structure for the display or sale of goods, wares or merchandise, or for the pursuit of any occupation whatsoever, unless a permit for same shall be obtained from the commissioner of public works; provided, that the commissioner of public works shall not grant such permit, except for the purpose of exhibiting for sale daily newspapers, within the district bounded on the north by the Chicago river, on the south by the north side of Van Buren street, on the east by Lake Michigan and on the west by the Chicago river.”

It is our opinion that the boxes employed by the Herald and Examiner for the sale of their newspapers clearly come within the provisions of the aforequoted section.

Section 367 of the said Code provides:

“367. Posting bills.) It shall be unlawful for any person, firm or corporation to post, stick, stamp, tack, paint or otherwise fix, or cause the same to be done by any person, any notice, placard, bill, card, poster, advertisement or other device calculated to attract the attention of the public, to or upon any sidewalk, crosswalk, curb or curbstone, flagstone or any other portion or part

of any sidewalk or street, lamp post, electric light, telegraph, telephone or trolley line pole, hitching post, hydrant, shade tree or tree-box, or upon any bridge, pier, fence, gate, gate-post, or upon any pole, box or fixture of the fire alarm or police telegraph system, except such as may be required by the laws of the State of Illinois and the ordinances of the City of Chicago."

It is our opinion that the placing of boxes by the Herald and Examiner, with the name of the newspaper printed on the outside, upon various poles and posts throughout the city, is a device calculated to attract the attention of the public within the purview of the aforementioned section.

The following sections provide for the procedure to be followed for the removal of any such obstructions:

"3699. Obstructions—removal.) The commissioner of public works is hereby authorized to order any article or thing whatsoever which may encumber or obstruct any street, alley, public land, wharf or pier within the city to be removed; if such article or thing shall not be removed within six hours after notice to the owner or person in charge thereof to remove the same, or if the owner cannot be readily found for the purpose of such notice, the commissioner of public works shall cause the same to be removed to some suitable place, to be designated by the said commissioner. The owner of any article so removed shall be subject to a penalty of not more than ten dollars, in addition to the costs of such removal."

"3711. Refusal to remove—nuisance.) Whenever the owner of any building, structure, fence, porch, steps, gallery or other obstruction upon any street, alley, sidewalk or public ground in this city, shall refuse or neglect to remove the same, after notice served as prescribed in the preceding section, the same shall be deemed a nuisance, and the commissioner of public works shall cause the same to be removed or taken down, and the expense of such removal or taking down shall be recoverable from the owner in an action of assumpsit. Any person who shall forcibly and unlawfully resist the execution of any order of the commissioner of public works in the premises shall be deemed guilty of disorderly conduct and shall be subject to a penalty of not less than five dollars nor more than two hundred dollars."

“3215. Power to remove obstructions.) The commissioner of public works may direct the removal of any article or thing whatsoever, which may encumber or obstruct any street, avenue or alley in the city.”

The fact that some of the boxes are placed upon poles used by the street car companies for the purpose of suspending the trolley wires, makes no difference. The poles used by the street car companies are placed in the city streets by permission of the City Council of the City of Chicago. The ordinances authorizing the placing of said poles upon the streets of the city provide that “the company may use its trolley poles, feeder poles, trolley wires, feeder wires and conduits authorized and provided for in said ‘Exhibit B’ for all purposes solely connected with the operation of its street railways, such as power, light, heat and telephonic and other signals.” This provision in the ordinance, clearly limits the use of the poles by the street car companies to the purposes therein designated and does not allow them to be used for the purpose of attaching devices for selling newspapers. The procedure then to be followed for the removal of these boxes is the same, regardless of whether they are attached to the poles of the street car companies or to posts erected by the City of Chicago for the purpose of designating the names of the streets. The Commissioner of Public Works may proceed according to the provisions of Section 3699, hereinabove quoted, and may serve notice requiring the boxes to be removed. If such boxes are not removed within the time designated by the ordinance, the Commissioner of Public Works may then proceed to remove the same by City employes.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Power of City to Pass Ordinance Prescribing How
Vehicles Shall Pass When Overtaking and
When Overtaken Vehicle is on
Car Tracks.**

August 6, 1924.

HON. FRANK J. TOMCZAK, Chairman, Mayor's Safety Commission.

Dear Sir:

You have requested the Corporation Counsel for an opinion relative to the validity of the traffic regulations contained in Section 3836 and Section 3844 of The Chicago Municipal Code of 1922.

Section 3836 of said code provides as follows:

"3836. Vehicles passing—motor vehicles not to run on left-hand tracks.) All vehicles shall keep as close to the right-hand curb as safety and prudence shall permit, except when overtaking and passing another vehicle, and except when running within the car tracks, as provided in Section 3830. An overtaken vehicle must at all times be passed on its left side, except in the case of motor vehicles and motorcycles passing street cars or other vehicles when running within the car tracks; in such case such motor vehicles or motorcycles shall not turn to the left into the track reserved for street cars and vehicles moving in the opposite direction, but shall pass to the right of such street car or vehicle so overtaken."

In our opinion the aforequoted section is not in conflict with the Illinois Motor Vehicle Law. It is true that Section 40 of said law provides in part as follows:

"Any such person so operating a motor vehicle or motor bicycle shall, on overtaking any such horse, draft animal or other vehicle, pass on the left side thereof, and the rider or driver of such horse, draft animal or other

vehicle shall, as soon as practicable, upon signal, turn to the right of the center of the beaten track of such highway so as to allow free passage on the left."

It is our opinion that the aforementioned section does not relate to passing street cars. The section does not refer to street cars, but only refers to "a horse, draft animal or other vehicle." It further provides that the rider or driver of the horse, draft animal or other vehicle about to be passed shall turn to the right of the center of the highway in order to allow the other vehicle to pass on the left. Obviously this section does not purport to relate to street cars, because a street car is operated upon a fixed track, and cannot move to the right of the center of the highway. That the City has the right to pass reasonable traffic regulations other than speed regulations, was stated by the Supreme Court of Illinois in the case of *Elie v. Adams Express Co.*, 300 Ill. 340.

In so far as the said ordinance relates to passing motor vehicles driving within the car tracks upon the right, it is directly in conflict with the motor vehicle law, and therefore we recommend that the ordinance be amended with regard to passing of motor vehicles upon the right.

Section 3844 of the said Code, provides as follows:

"3844. *Speed of vehicles and horses near school houses—penalty.*) It shall be unlawful for any person, firm or corporation to operate or run, or cause to be operated or run, any street car, motor truck, motor driven commercial vehicle, or motor vehicle used within the city limits for public hire, or to ride or drive, or cause to be ridden or driven, any horse, or other animal, or to drive or propel, or cause to be driven or propelled, any cab, carriage, wagon or other animal drawn vehicle, or bicycle, on the surface of the street, within four hundred feet of any school house in the city, at a greater speed than five miles an hour, between the hours of 8 o'clock A. M. and 5 o'clock p. m., on any day during which school is in session in such school house. Any person, firm or corporation violating any of the provisions of this section shall be subject to a penalty of not less than five dollars nor more than one hundred dollars for each offense."

Although the Illinois Motor Vehicle Law provides in Section 26 thereof that no city, town or village shall have the power to make any ordinance limiting or restricting the speed of motor vehicles, there is a proviso to said section as follows:

“Provided, that nothing in this Act contained shall be construed as affecting the power of municipal corporations to make and enforce ordinances, rules and regulations affecting motor trucks and motor driven commercial vehicles used within their limits for public hire, or from making and enforcing reasonable traffic and other regulations except as to rates of speed not inconsistent with the provisions hereof.”

In view of the aforementioned proviso, we are of the opinion that Section 3844 is not invalid in so far as it purports to establish a speed regulation affecting motor trucks, and motor driven commercial vehicles used within the city limits for public hire. It may be, that the provisions of this ordinance are sufficiently broad to cover other vehicles than those included in the proviso, and if the ordinance does, it is invalid as to those kinds of vehicles. However, we are of the opinion that the ordinance is not rendered invalid as to its regulations with respect to those vehicles mentioned in the proviso. Our conclusion, therefore, is that Section 3844 of the said code should be enforced against motor trucks and motor driven commercial vehicles used within the city for public hire. That as to all other vehicles it should not be enforced.

Very truly yours,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Power of Commissioner of Public Works to Regulate
Charges for Dancing on Municipal Pier—
Interpretation of Contract Granting
Dance Hall Concession.**

August 6, 1924.

HON. MARTIN J. O'BRIEN, Comptroller.

Dear Sir:

You have advised the Corporation Counsel that certain changes have been made by the Commissioner of Public Works relative to the charge for dancing on the Municipal Pier, and requested an opinion as to the legality of the same.

In the contract entered into by the City of Chicago and Patrick T. Harmon for conducting the dancing concession on the Municipal Pier during the years 1923 to 1927, the following provisions relate to the power of the Commissioner of Public Works under the contract to alter the charge for dancing:

“Said dances to be conducted and said rights and privileges to be exercised by said concessionaire in such manner and at such times during the periods aforesaid as may be determined and directed by the commissioner of public works, and subject to the specifications hereto attached and made part of this agreement.”

* * * * *

“The concessionaire, in consideration of the covenants to be performed by the city, * * * does hereby covenant and agree * * * to operate said concession contemplated by this agreement to the satisfaction of the said commissioner of public works.”

* * * * *

“It is understood and agreed that said commissioner of public works shall have the right to decide all questions arising as to the proper performance of this contract, and that his decision as to the proper perform-

ance of this contract shall be binding upon the concessionaire."

* * * * *

"The dancing shall be conducted in a manner satisfactory to the commissioner of public works."

* * * * *

"No charge shall be made for admission to the building, but a charge not exceeding five cents (5c) for a dance shall be allowed for each couple participating."

The changes which have been made by the Commissioner of Public Works are that persons are admitted to the dance floor in the auditorium on the recreation section of the pier upon the payment of twenty-five cents (25c) per person, and that a charge of ten cents (10c) for wardrobe is made for men; there is no wardrobe charge for ladies.

The power and authority vested in the Commissioner of Public Works, by the above quoted sections of the contract, are very broad. Without question he may make rules and regulations concerning the charge to be made for dancing by the public providing the charge does not exceed five cents (5c) per dance for each couple as provided in the last quoted section of the contract. If a charge of twenty-five cents (25c) for general admission is made, a couple must pay fifty cents (50c) for admission. In order that the charge per couple be not greater than five cents (5c) per dance, as required by the contract, each couple must dance ten dances, or more. The question is, therefore, whether or not it is reasonable to assume that the average couple will dance more than ten dances. The dance hall is open from 8 to 12 p. m. Each dance lasts about five minutes; each dance follows the other with an intermission only long enough to clear the floor. Ten dances ought not to occupy more time than one hour. It seems reasonable to assume that any couple visiting the dance hall and paying a general admission fee would stay at least an hour, or would dance at least ten dances. Therefore, we do not believe that the ruling of the Commissioner of Public Works, that twenty-five cents (25c) per person shall be paid for admission to the dance floor, conflicts with the provisions of the contract.

The charge of ten cents (10c) for wardrobe for men is a regulation clearly within the power of the Commissioner granted him by the aforementioned sections of the contract.

It is our conclusion that the aforementioned changes made by the Commissioner of Public Works are legal and are in accordance with the contract.

Very truly yours,

ALBERT H. VEEDER,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Control of City Over Michigan Boulevard Bridge and of Lights on Approaches.

August 6, 1924.

HON. JOHN T. MILLER, Commissioner of Gas and Electricity.

Dear Sir:

We have your letter of the 5th inst. requesting this office for an opinion as to whether the City of Chicago or the Lincoln Park Commissioners should assume the responsibility of maintaining the two bridge lighting standards immediately north of the Michigan boulevard bridge, and also requesting this office to take up with the Legal Department of the Lincoln Park Commissioners the matter of the establishment of a boundary line between those portions of Michigan avenue within the respective jurisdictions of the City and of the Commissioners.

The ordinance of July 2, 1923, ceding to the Commissioners the control of Michigan avenue from the bridge north to Pearson street fixes the boundary at the "north line of the upper level of the bridge." We think a proper solution of your question rests solely upon a reasonable construction of this expression.

It is obvious from a reading of the ordinance, which is general in its terms and does not specifically cover the point,

that it was the plain intent of the City and of the Commissioners that the City should retain plenary control and jurisdiction of the bridge. The word "bridge" is not necessarily restricted in its meaning to the actual structure spanning the river, but it is as well inclusive of all necessary and convenient appurtenances, appliances or other structures or contrivances usual, customary or requisite in the proper operation and maintenance of the structure as a whole, particularly those in existence at the time the ordinance was passed. Your letter states that these two bridge lighting standards are operated primarily as lighting units for the bridge, and from this we gather that these standards if not actually a part of, are at least sufficiently appurtenant and supplemental to the span to be regarded as a part of the bridge within the meaning of the ordinance, and, therefore, within the jurisdiction and control of the City.

This should not be construed as necessarily including within the domain of the City such portion of Michigan avenue as lies between the north line of the span and the northernmost appurtenance to the bridge, but is meant to include only the appurtenances or appliances themselves. We do not think the situation requires a consideration of anything more than the actual question raised.

As to the establishment of a boundary line, it is our opinion that a construction of the ordinance in accordance with the views herein expressed, fixes a boundary line sufficient for all practical purposes, and unless something, at present unforeseen, develops, we do not see any real necessity for discussing the matter with the Lincoln Park Commissioners, although this office is at all times ready and anxious to consult and confer with other governmental agencies whenever a proper case arises.

Yours very truly,

JAMES J. COUGHLIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Placing of Stars on Automobiles Under Ordinance
Providing for Special Star for Elective
Officials Having Police Power.**

August 6, 1924.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

You have requested the Corporation Counsel to outline your duties under the amendment to The Chicago Municipal Code of 1922 known as Section 3078a which is as follows:

“Section 3078a. Automobile Emblems—Elective City Officials.) The superintendent of police shall have power and authority and it shall be his duty to prescribe an appropriate form of emblem which shall be awarded to all elective city officials having police powers, and they are hereby permitted to display same upon automobiles maintained for their personal use. All expenses incident to the issuance of such emblems shall be borne by the said elective officials.”

Under the said section it is made the duty of the Superintendent of Police to prescribe a form of emblem for use on automobiles to be furnished to all elective city officials having police powers. This duty is imperative and the Superintendent of Police must prescribe such an emblem and furnish it upon request to the officials entitled thereto.

The only elective city officials having police powers are the Mayor and the Aldermen. (Paragraphs 22 and 86 of Chapter XXIV of Cahill's Illinois Revised Statutes for 1923.) All other city officials are either appointed or have no police power and therefore are not entitled to these emblems.

This ordinance does not purport to prevent any city official from having a star upon his car which simply designates his office, and does not otherwise purport to signify police power. But under the said ordinance the only officials who are entitled to the stars contemplated by this ordinance are the Mayor and the Aldermen.

We note that the communication attached to your request for this opinion is from the City Treasurer, and that he requests one of these emblems. As hereinabove stated, the City Treasurer is not one of the City officials who is entitled to this emblem.

Very respectfully,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Power of Fire Commissioner to Enter Into Contracts— Procedure.

August 8, 1924.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

You have submitted to the Corporation Counsel a form of advertisement and a form of contract for the purchase of hose for the Fire Department, and have requested this office to approve the legality of same.

The ordinance authorizing the Fire Commissioner to enter into a contract for the purchase of materials and supplies for the Fire Department provides as follows:

“1165. Contracts.) The fire commissioner shall have the power to award and execute contracts for such materials and supplies as shall be necessary in the administration of the affairs of the fire department in cases wherein the cost of such material and supplies shall exceed the sum of five hundred dollars; provided, that all such contracts shall be let to the lowest responsible bidder, after advertising in the same manner as is provided for the letting of similar contracts in the department of public works; and provided, further, that no

such contract for materials or supplies shall be let for a period extending beyond the end of the current fiscal year."

The aforequoted ordinance provides that contracts shall be let in the manner provided for the letting of similar contracts in the Department of Public Works. The ordinance providing for the letting of contracts in the Department of Public Works is as follows:

"3260. *Contracts—how made.*) All contracts, when the expense thereof shall exceed the sum of five hundred dollars, shall be let to the lowest responsible bidder, after advertising the same for at least ten consecutive business days, except as may be otherwise provided by law, and shall be approved by the mayor; but any such contract may be entered into by the commissioner of public works without advertising for bids and without such approval, when authorized to do so, by a vote of two-thirds of all the aldermen elected. No contract shall be made relating to any of the matters within the cognizance of the department of public works unless the same shall have been authorized by the city council. No contract for coal or for any other supplies, for which said commissioner may be authorized to contract, shall be let for a period extending beyond the end of the current fiscal year; but in cases where the said commissioner shall deem it necessary for the administration of any department, the right may be reserved to the City of Chicago in any such contract to extend the operation of the same for a further period of not to exceed six months, such right to be exercised by the city council."

"3261. *Contracts—bids for.*) In all cases, the bids for doing any work or making any public improvement, or for furnishing any materials or supplies, shall be sealed bids, directed to the commissioner of public works, and shall be accompanied by a deposit, the amount of which shall be fixed by said commissioner and named in said advertisement, and which shall not exceed five per cent of the estimated cost of the improvement or work to be done, or of the materials or supplies to be furnished, or be less than the sum of one hundred dollars. Such deposit shall be in money, or a certified check upon some Chicago bank in good standing, payable to the order of said commissioner of public works, and shall be forfeited

to the city in the event that the bidder shall neglect or refuse to enter into a contract, and give bond as hereinafter required, to execute the work or furnish the materials or supplies for the price mentioned in his bid and according to the plans and specifications, in case the contract shall be awarded to him. Such bids shall be opened at the hour and place mentioned in such notice; and should such bid or bids be rejected, or should it become necessary for any other reason to readvertise for proposals, such subsequent advertisement may be, at the discretion of said commissioner, for three instead of ten consecutive business days as required in the first instance. Said commissioner may in such advertisement reserve the right to reject any and all bids.

“3262. *Contracts—how let.*) All contracts exceeding in amount the sum of five hundred dollars, for work, materials or supplies, relating to any of the matters under the cognizance of the department of public works, shall be let by the commissioner of public works to the lowest reliable and responsible bidder or bidders, whose bid does not exceed the estimate; and bonds, to be approved by the commissioner, shall be taken for the faithful performance thereof; all such contracts shall be executed in triplicate by the commissioner of public works, on the part of the city, and by the contractor; one original copy so executed shall be kept and filed in the office of the commissioner of public works, one shall be filed in the office of the comptroller, and the third shall be given to the contractor. All contracts and bonds so taken shall be in the name of, and run to, the City of Chicago; and every contract for a sum greater than five hundred dollars shall have the approval in writing of the mayor endorsed thereon and shall be countersigned by the city comptroller.

No contract shall be binding upon the City of Chicago, nor shall any work contracted for be commenced or any materials or supplies delivered thereunder, until such contract has been duly executed, and where such contract exceeds in amount the sum of five hundred dollars, until such contract has been approved and countersigned as aforesaid.”

The blank forms which you have submitted to us for advertisement are in proper legal form and comply with the aforementioned requirements of the ordinance. We call your

attention to the fact that the form which you have submitted to us requires that a certified check for fourteen hundred dollars shall be submitted with the proposal. As provided in the aforequoted ordinance, this sum must not exceed 5 per cent of the estimated cost of the materials to be furnished. We take it that this is the case. Your attention is also called to the fact that this advertisement must be published for at least ten consecutive business days.

The form of contract which you have submitted complies substantially with the requirements for City contracts contained in Section 3263 of the Chicago Municipal Code. The form of contract is in proper legal form.

With regard to the form of the bond, which you have submitted to us, it is our suggestion that you insert the following provision:

“and will pay all claims and payments which may arise or accrue against the City as a result of the accidental injury or death of any such contractor’s or sub-contractor’s employees.”

This provision should be inserted. Otherwise the bond is in proper legal form.

Your attention is called to the fact that in any case where a contract is made by you for the furnishing of supplies and materials for the Fire Department, which supplies or materials are specially manufactured for the purpose, and are not part of the regular stock in trade, then it is necessary that the contract contain a provision requiring the contractor to insure his employes the compensation provided for by the Workmen’s Compensation Act.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Procedure Where Hose, Purchased for Fire Department, is Condemned.

August 8, 1924.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

You have requested the Corporation Counsel for an opinion relative to the proper procedure to be followed with regard to the Eureka hose purchased from the United States Rubber Company and delivered in January and February of 1924, part of which has been condemned and in other parts of which there is a shortage.

We have examined the correspondence which took place between Hon. John F. Cullerton, ex-Fire Commissioner, and the United States Rubber Company. In a letter dated December 1, 1923, signed by George F. Hand, Chicago manager for the United States Rubber Company, it is stated that the hose carried the regular guarantee of three years against defect in material or manufacture and is also guaranteed to stand a test pressure of 400 lbs. per square inch on delivery. When you state that part of this hose has been condemned, we take it, that it has been condemned because it does not comply with the aforequoted guarantee. As to all hose which has been condemned for this reason, the remedy as prescribed by Section 69 of the Sales Act is that the said hose should be returned to the seller as soon as it is discovered that the hose does not comply with the terms of the guarantee and a notice should be given that because of a breach of the guarantee the City refuses to pay for that particular hose.

Whenever a shortage is discovered in any particular delivery of hose, if the hose is otherwise of proper quality and complies with the guarantee, the hose may be kept, but the amount of the shortage should be deducted from the contract

price and the City should pay only the value of the hose actually received.

In answering your inquiry it has been assumed that no payments have as yet been made by the City to the United States Rubber Company for the said hose. Should payments have already been made, the condemned hose should be returned and the City will have to start suit to recover back the amount paid, unless the company is willing to refund it.

Very respectfully,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Refund of Special Assessment When Improvement is
Abandoned but the Claimant Does Not Assert
Claim for About Fourteen Years.**

August 8, 1924.

HON. ROSS A. WOODHULL, Chairman, Finance Committee.

Dear Sir:

Referring to your letter of June 25th addressed to the Hon. Francis X. Busch, and returning all correspondence submitted relating to the application of the R. A. Wells Lumber Company for refund of moneys apparently paid the County Collector on October 25, 1899, we beg to say:

We understand that the special assessment in question was levied under the act in force prior to July 1, 1897, when it was proper and lawful to levy and collect a special assessment for a local improvement before the work was completed, and we also gather from the papers that in this particular

instance, after the R. A. Wells Lumber Company had paid the special assessment charged against its property, and before the work of construction had begun, the City Council on February 25, 1901, passed an ordinance or resolution repealing the original ordinance for the improvement, and providing for or declaring that the amounts of money theretofore collected should be rebated to the person or persons paying the same.

No claim was ever preferred by the R. A. Wells Lumber Company for reimbursement until April 9, 1924, but in the meantime, and on July 17, 1918, the City Council, in pursuance of the authority conferred upon it by an act of the legislature approved May 26, 1917, and in force July 1, 1917, being Sections 1006 to 1012, inclusive, Chapter 24, Cahill's Statutes, 1923, transferred the assessment collected from the claimant to the Unclaimed Rebate Fund.

The answers to the questions propounded by you depend primarily upon a consideration and interpretation of Sections 1006 and 1009, Chapter 24 of Cahill's 1923 Statutes, the language of which sections are as follows:

"1006—Unclaimed money may be transferred to 'Unclaimed Rebate Fund.') Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That any city, town or village of this State having any undistributed or unclaimed money received from the making of any local improvement paid for wholly or in part by special assessment or special taxation, and which money shall have remained in the possession of said city, town or village for a period of eight years or more undistributed or unclaimed as a rebate or refund, after the provisions of the Local Improvement Act have been complied with in regard to refunds or rebate, may set aside and transfer said money, so undistributed or unclaimed into a special fund to be known as the 'unclaimed rebate fund' which may be used as hereinafter provided."

"1009—Forfeiture of claimants' rights.) 4. Unless a claim is made by the person entitled thereto before the passage of an ordinance by said city, town or village, as specified in section two (2) of this Act all interest therein and all right and title thereto of any and all claimants

shall be forfeited and barred; and no action shall be begun or claim made for any money undistributed or unclaimed as a rebate or refund, received from the making of any local improvement, paid for wholly or in part by special assessment or special taxation, after said money shall have remained in the possession of said city, town or village undisturbed (undistributed) or unclaimed as a rebate or refund, for a period of eight years or more, and where such money has been set aside and transferred into a special fund known as the 'unclaimed rebate fund' in the manner hereinbefore provided."

We shall not enter into a discussion as to whether the foregoing sections apply to the instant case, in view of the fact that no improvement was made, although it is our opinion that the legislature, in employing the phrase "the making of any local improvement," had in mind the fact that in a legal sense, a local improvement is made when the corporate authorities of a municipality pass a valid ordinance for the same.

If this is the proper construction to place upon the phrase in question, then obviously, the Unclaimed Rebate Act expressly operates upon the situation presented by the facts here involved.

There is no doubt of course, under the law, that the legislature is vested with clear and explicit power to limit the time within which actions against a municipality may be brought. (*Dallas v. Young* (Tex. Civ. App.), 28 So. West 1036; *Scurry v. Seattle*, 8 Wash. 278; *Harris v. New York*, 125 N. Y. S.; 5 McQuillin on Municipal Corporations, Section 2489.) Furthermore, it is settled law that moneys paid under the circumstances surrounding these particular payments are paid voluntarily and without compulsion (*Otis v. The People*, 196 Ill. 542, 546), and in view of this fact, it is plain that the defense of the Statute of Limitations may be interposed by a municipality to an action for the recovery of taxes or special assessments illegally exacted from the property owner. (*Greenwood v. Town of La Salle*, 137 Ill. 225-228; *Hamilton v. City of Dubuque*, 50 Ia. 213; *Brown &*

Sully, v. Painter, 44 Ia. 368; 3 Cooley on Taxation (4th Edition), Section 1304.)

Applying the foregoing legal principles to the facts in this case, in the light of the provisions above excerpted from the Unclaimed Rebate Act, it clearly follows that the claim of the R. A. Wells Lumber Company is barred by the Statute of Limitations, and that the City of Chicago has an absolute defense at law to any suit that might be instituted for the recovery of the sum in question, assuming always that in transferring these unclaimed moneys to the Unclaimed Rebate Fund the City complied strictly with the provisions of Section 1007, Chapter 24 of Cahill's 1924 Statutes, regarding advertising, etc. It might not be amiss to call attention to the fact that Section 1009, *supra*, does not actually work a limitation upon the claimant's rights, but in reality enlarges the time given by the general Statute of Limitations for the recovery of moneys paid under the circumstances of this case.

It can hardly be disputed that when the City Council passed the repealing ordinance of February 25, 1901, which also provided for refund of the moneys theretofore collected, the right of action of the R. A. Wells Lumber Company immediately accrued. The City of Chicago was then in the position of holding funds voluntarily paid to it for the use and benefit of the person making such payments, and under the law, such person could maintain the action of *assumpsit* for money had and received. In fact, this was and is the proper and only remedy for the recovery of money illegally collected in the manner in which the collections were here made. (*Raisler v. Athens*, 66 Ala. 194; *Grand Rapids v. Blakeley*, 40 Mich. 367; 3 Cooley on Taxation (4th Edition), Section 1300.) It is, of course, unnecessary to adduce any authorities to the effect that, in Illinois, an action of *assumpsit* for money had and received must be instituted within five years from the date of the accrual of the action, otherwise the cause of action is barred by the Statute of Limitations. Hence, in the absence of the limitation clause of the Unclaimed Rebate Act, a claimant for rebate of a special as-

assessment illegally exacted, would be compelled to start suit within five years from the date of the accrual of the action, and would not be allowed eight years from the time the moneys came into the possession of the municipality.

It is true that there is no specific provision in the Local Improvement Act of 1897 limiting the time within which actions for rebate must be commenced, but the absence of such provision is indicative of a clear legislative intent that the general Statute of Limitations should apply. This contention finds express support from the fact that in the chapters of the statute dealing with unclaimed property and partition suits, viz., Chapters 141 and 146, Sections 5 and 37, respectively, claims for rebates are explicitly excepted from the operation of the Statute of Limitations. If the legislature did not intend to limit actions for the recovery of special assessment rebates, it would undoubtedly have incorporated a provision to that effect in the Local Improvement Law.

In conclusion, we give you below our answers to the three queries propounded by you.

1. The transfer to the Unclaimed Rebate Fund of the moneys paid by the R. A. Wells Lumber Company was proper.
2. The claim of the R. A. Wells Lumber Company is barred by both the special and general Statutes of Limitations.
3. The corporate fund can not be diminished for the payment of the claim of the R. A. Wells Lumber Company, but your attention is directed to the fact that Section 1011 of the Unclaimed Rebate Fund Act requires the return to this fund of any depletions caused by the use of moneys in this fund for other corporate purposes.

We have written this opinion solely with reference to the strict legal rights of the R. A. Wells Lumber Company,

and without regard whatever to the justice or general equities presented by the facts in the record.

Yours very truly,

THOMAS A. SHEEHAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Whether Fees for Inspection of Motion Pictures Should be Charged Per Reel or Per Film.

August 11, 1924.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

In conformity with your request for an opinion relative to whether fees for motion picture permits should be charged per reel or per picture we desire to advise you as follows:

The following sections of The Chicago Municipal Code of 1922 are the sections which in anywise bear upon this question:

“2785. *Permit required to exhibit moving pictures.*)

It shall be unlawful for any person, firm or corporation to show or exhibit in a public place, or in a place where the public is admitted, anywhere in the City of Chicago any picture or series of pictures of the classes or kinds commonly shown in mutoscopes, kinetoscopes, cinematographs, and such pictures or series of pictures as are commonly shown or exhibited in so-called penny arcades, and in all other automatic or moving picture devices, whether an admission fee is charged or not, without first having secured a permit therefor from the superintendent of police.

It shall be unlawful for any person, firm or corporation to lease or transfer, or otherwise put into circula-

tion, any motion picture plates, films, rolls or other like articles or apparatus from which a series of pictures for public exhibition can be produced, to any exhibitor of motion pictures, for the purpose of exhibition within the city, without first having secured a permit therefor from the superintendent of police."

"2786. *Application for permit.*) Before any such permit is granted, an application in writing shall be made therefor, and the plates, films, rolls or other like apparatus by or from which such picture or series of pictures are shown or produced, or the picture or series of pictures itself as shown or exhibited, shall be shown to the superintendent of police, who shall inspect such plates, films, rolls or apparatus or such picture or series of pictures, or cause them to be inspected, and within three days after such inspection he shall either grant or deny the permit. In case a permit is granted it shall be in writing and in such form as the superintendent of police may prescribe."

"2791. *Fee for permit.*) The permit herein provided for shall be obtained for each and every picture or series of pictures exhibited, and shall be required in addition to any license or other imposition now required by law or ordinance. The fee for the original permit in each case shall be three dollars, and for each additional permit one dollar, which fees shall be paid to the city collector before the permits are issued. Such permit shall be granted only after the motion-picture film for which said permit is requested has been produced at the office of the inspector of morals in the city hall for examination or censorship."

The provisions of the aforequoted sections of the moving picture ordinance do not definitely state whether the fee shall be charged for each reel, or for the entire picture. However, the first sentence of Section 2791 does provide that the permit shall be obtained *for each and every picture or series of pictures exhibited*. The purpose of dividing up motion pictures into several reels is merely that of convenience in handling the film. It is all part of the same picture or series of pictures, therefore, it is our belief, that the intention of this ordinance is that the one fee shall be paid for the entire series of pictures, regardless of how many reels may be em-

ployed. It is our belief that in construing this ordinance, regard should be had to the fact that the ordinance is not a revenue measure, but is solely a regulatory measure under the police power. The purpose of the ordinance is not to exact revenue but to regulate the type and quality of pictures that are shown.

We therefore advise you that you should charge a fee of three dollars (\$3) for the original permit for the complete picture, regardless of the number of reels into which it may be divided, and that you should charge a fee of one dollar (\$1) for each additional permit, the additional permit to cover the entire additional picture.

Respectfully submitted,

ALBERT H. VEEDER,

Approved: *Assistant Corporation Counsel.*

EDMOND L. MULCAHY,
Acting Corporation Counsel.

Appointment by Superintendent of Police of Special Policewomen Paid by Private Funds.

August 12, 1924.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

The South Shore Protective Association requests from you police authority for two women to be appointed to patrol Rainbow Park Beach. You ask an opinion "as to whether or not I could delegate police power to privately paid women."

Article VIII of Chapter LXI (The Chicago Municipal Code of 1922) provides that "any person except policemen and the sheriff or his deputies who for hire or reward shall guard or protect any building, structure, premises, person or property within the City is hereby defined a special policeman." Provision is made for appointment of such person by the chief of police if applicant meets the requirements set

out and is satisfactory to the chief. If appointed the applicant must pay \$5 license fee and deposit \$2 for badge. The appointed person is then declared to have the powers of a regular police patrolman at the place for which he is appointed.

So far as the criminal laws are concerned, no permission is required to enforce them. Everyone is bound to obey them and make others obey them. A private citizen may arrest anyone, policeman or other person, whom he finds violating the criminal laws.

The statutes give authority to policemen to arrest on view for violation of ordinances. Your authorization under the above mentioned provision of The Municipal Code is necessary before persons may arrest on view for infractions of ordinances.

Respectfully submitted,

DANIEL V. GALLERY,

Approved :

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Parking of Sight-Seeing Buses in the Loop.

August 12, 1924.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir :

You have requested an opinion from the Corporation Counsel relative to the right of sight-seeing buses to park in front of the Otis building, 10 South La Salle street. In your communication you stated that you were informed that a Council order was to be passed, authorizing buses to be parked at this locality, but that no such Council order was ever passed.

According to the provisions of Section 3974 of The Chicago Municipal Code of 1922, any licensed public passenger vehicle which exhibits the name of the owner and its license

number, may stand at a cab or hack stand. A bus is included by Section 3917 of said Code as a public passenger vehicle. Therefore should the buses be parked at a cab or hack stand, we see no objection to their so parking, provided they do not exceed the capacity of said stand.

On the other hand, if the said buses are not parking at a cab and hack stand, then they are subject to the same parking rules within the loop as are all other vehicles, and should they violate the same, they should be treated in a similar way as any other infractor.

We do not include a compendium of the general parking regulations in the loop, for we believe that you are familiar with the same.

Respectfully submitted,

ALBERT H. VEEDER,

Approved: *Assistant Corporation Counsel.*

EDMOND L. MULCAHY,
Acting Corporation Counsel.

**Rights Under Annuity and Benefit Fund Act of Police-
men Discharged Prior to January 1, 1922,
and Reinstated Afterwards.**

August 13, 1924.

MR. GEORGE C. SIKES, Secretary, Policemen's Annuity and
Benefit Fund.

Dear Sir:

I am in receipt of your letter of July 11, 1924, inquiring as to the pension rights of Sergeant Edward T. Davis, and stating that Mr. Davis was discharged before January 1, 1922, and was reinstated since that date.

Section 36 of the Policemen's Annuity and Benefit Fund Act provides that a policeman who shall not be in the police service of the city on December 31, 1921, and who was in such service prior to that date, and who shall re-enter the service after that date, and before attainment of the age of fifty-seven (57) years, shall not have any right to be credited with any sum or sums for prior service annuity and widow's

prior service annuity purposes on account of any service rendered prior to January 1, 1922, and that such policeman shall not have any right to *prior service annuity*, and the wife or widow of such policeman shall not have any right to widow's prior service annuity; but that the period of service rendered by any such policeman prior to January 1, 1922, shall be included in computing the term of service of such policeman for age and service annuity and widow's annuity purposes.

Section 49 of the Policemen's Annuity and Benefit Fund Act provides that in computing the term of service rendered by any policeman prior to January 1, 1922, there shall be counted in addition to all periods of time during which such policeman shall have performed the duties of his position, the following: All periods of vacation, all periods of leave of absence with whole or part pay, all periods of leave of absence without pay which were necessary on account of disability.

What *amount* of pension Mr. Davis would be entitled to be paid need not be passed upon at this time as Mr. Davis is not an applicant for pension.

Respectfully submitted,

GEORGE F. MULLIGAN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

**Appropriation for Cost of Moving Electric Light Pole
in Making Local Improvement—Reimburse-
ment of Owners When Laying
Their Own Sidewalks.**

August 13, 1924.

MR. EDWARD J. GLACKIN, Secretary, Board of Local Improvements.

Dear Sir:

You have referred to us for our opinion a copy of a letter dated July 18, 1924, addressed to the Board of Local Improvements by its Superintendent of Sidewalks.

The question raised in the referred communication is whether the appropriation for 1924 made by the City Council for moving electric light poles in connection with special assessment improvements is available for reimbursing owners who lay sidewalks by private contract upon their property for the expense of moving electric light poles when the laying of the sidewalk requires that such be done.

The appropriation in question is found on page 65 of the Annual Appropriation Bill for the year 1924, Item 50-S-8, and is worded as follows:

“For cost of moving electric light poles in connection with special assessment improvement.....\$50,000.”

We are of the opinion that this appropriation is available to defray such expenditure where the owner of the premises upon which the light poles stand, laid the walk pursuant to the provisions of the Sidewalk Act of 1905, or Section 34 of the Local Improvement Act. The former provides that the Corporate Authorities may lay sidewalks by special tax where such improvement has been authorized by ordinance, and the owners of the several parcels of property fronting said improvement may thereupon elect to construct for themselves that portion of the sidewalk along their respective frontages. Section 34 provides that frontage owners may also lay their own sidewalks where the improvement is made by special assessment.

An Appropriation Ordinance is a law and must be so construed, but in appropriation ordinances, on account of their necessary brevity of statement, more latitude of interpretation is permissible than would be allowed where the provision is definitive of individual rights or duties. It is to be noted that in the above appropriation the phrase of limitation used, is:

“In connection with special assessment improvement.”

It is our opinion that the intention of the Council was not to limit this appropriation to special assessments alone,

or otherwise it would be an illegal withdrawal of public funds even to reimburse the Department of Gas and Electricity for moving said electric light poles pursuant to an improvement made by the Board by special tax, which is the procedure most frequently followed in making sidewalk improvements.

We are of the opinion, therefore, that the term "in connection with special assessment improvement" means "in connection with an ordinance for a local improvement."

This being true, a property owner who elects to construct a sidewalk in front of his lot pursuant to the requirements of an ordinance for such improvement does so in connection with the improvement and, therefore, would be entitled to be reimbursed for any expenses incurred in moving said light poles.

The very fact that the improvement is made pursuant to ordinance, and the work must be done in accordance with the specifications of the ordinance even if constructed by the owner himself, is a clear indication of the fact that the work is done in connection with the ordinance for the improvement.

It should be noted, however, that if the frontage owner constructs a sidewalk voluntarily and not as a result of the exercise by him of his statutory election in a proceeding for such improvement, he may not in our opinion avail himself of the benefits of this appropriation. A conclusion so broad as to admit such voluntary improvements to the benefits of the appropriation would fly in the face of every rule of statutory construction and make public funds subject to the interests of property owners and speculators regardless of whether or not the improvement is necessary.

Very truly yours,

GEORGE F. HURLEY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Rights of Property Owner Who Feels Aggrieved by Assessment for an Improvement.

August 14, 1924.

MR. JOHN J. SLOAN, President, Board of Local Improvements.

Dear Sir:

You have referred to this department a copy sent to you of a letter of Mr. Geary Dannesberg addressed to Mr. Glackin, for an opinion upon the questions presented therein.

The writer asks whether (a) in all cases where lots on opposite sides of the street are identical as to area, dimensions and location, the assessment on each lot for paving the street between them would not be the same, and, (b) would this not be true also where the lands are unplatted?

We feel that the questions urged present matters largely of fact. The Constitution and the Local Improvement Act do not require in local improvements the uniformity and equality of assessment insisted upon for other forms of taxation. And the Local Improvement Act does not contain any instructions to the authorities charged with spreading the assessment pertaining to this situation.

Thus, it is left to the discretion of the Superintendent of Special Assessments and his deputies to fix the amount of the assessment upon each lot, block or parcel assessed for the improvement,—*subject, however*, to the rights of the owners of the property assessed to appear in court and object to the whole proceeding, or to the assessment against their property. And they are entitled to be heard by a jury upon the question whether their property has been assessed more than its proportionate share of the improvement,—which opens up fully for determination the questions propounded by Mr. Dannesberg.

The assessment spreaders are assumed to exercise their best judgment in making the assessment roll, but the owners

are in no way bound by their judgment as expressed in the roll. If Mr. Dannesberg feels aggrieved and the Superintendent of Special Assessments feels that there is no error in the roll, the matter can be fully adjudicated and determined by the court.

Very truly yours,

GEORGE F. HURLEY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Laying of Drains and Water Service Pipes by Special Taxation.

August 14, 1924.

MR. EDWARD J. GLACKIN, Secretary, Board of Local Improvements.

Dear Sir:

You advise us that the Board of Local Improvements desires our opinion upon the legal right of the Board to lay drains and water service pipes by special tax.

Section 9 of Article IX of the State Constitution authorizes the General Assembly to vest in the corporate authorities of cities, villages and towns the power to make local improvements by special assessment or by special taxation of contiguous property or otherwise.

Pursuant to this constitutional authority, the Legislature passed the Local Improvement Act (1897) which vests in the Board of Local Improvements, together with the City Council, the authority to make local improvements by special assessment or by special taxation of contiguous property or by general taxation or otherwise, as they shall by ordinance prescribe.

The Board, therefore, can originate a local improvement to be paid for by special taxation if it should so decide. The language of the Constitution and the Local Improvement Act clearly establishes the right in the Board not only to originate local improvements, but also to recommend in what manner they shall be financed.

It is our understanding that improvements of the nature under consideration here, are made almost exclusively in areas of the city that are undergoing the general development that follows in the wake of subdividing, selling and building upon what was theretofore semi-subdivided lands, that is, areas where blocks with streets and alleys are laid out, lateral sewers and water mains put in, but without further improvement. In order that buildings erected on these newly subdivided lots may be connected with the sewers and mains, the Board must proceed to put in the drains and water service pipes to which the private piping from the buildings can run. These water service pipes and house drains cannot be put in at the same time the mains and sewers are laid, where such mains and sewers abut upon unsubdivided property, because the Supreme Court has repeatedly held that to do so is to subdivide the owner's property into building lots without his consent, and so amounts to a taking of his property without due process of law. This feature of the improvement therefore, must wait until the owner has subdivided his property.

Warner v. City of Chicago, 118 Ill. 329.

Cram v. City of Chicago, 139 Ill. 265.

People ex rel. Kockersperger v. Cook, 180 Ill. 341.

Bickerdicke v. City of Chicago, 185 Ill. 280.

City of Chicago v. Wells, 236 Ill. 130.

In *Cram v. City of Chicago*, *supra*, it was held that where the real estate abutting upon an improvement is laid out into blocks, the City, in making assessments on the same, will have no right to subdivide such blocks into lots. It must proceed against the property benefited as it is known and legally described.

In *City of Chicago v. Wells, supra*, the amendment to Sec. 41 of the Local Improvement Act which provides that unsubdivided tracts of land may, for the purpose of spreading assessments for house drains and water service pipes, be divided into lots of a frontage of twenty-five feet was held unconstitutional and void.

Because of this situation it is necessary under these circumstances to make this improvement separately, although logically it ought to be made in conjunction with the laying of the sewers and mains.

* The question then arises whether the laying of drains and water service pipes is a local improvement.

The test prescribed by our Supreme Court in determining whether an improvement is local or not is perhaps most succinctly set out in *Ewart v. Village of Western Springs*, 180 Ill. 318, at p. 323:

“The test whether an improvement is local or not depends upon the question whether or not it specially benefits the property assessed.”

Whether or not such an improvement specially benefits the property assessed is a matter of fact. But on reason, since drains and water service pipes are absolutely necessary for the abutting property owners to use the sewer and to receive water from the mains, it would seem that such improvements would specially benefit the property assessed to the extent that the sewers and the water mains would benefit the property assessed, being an integral part of the whole improvement.

As was said by the Supreme Court in *Northwestern University v. Wilmette*, 230 Ill. 80, at p. 86:

“We think a system of sewers in a city or village which conveys the surface water from the cellars and basements of property located therein * * * is a local improvement. * * *”

Hewes v. Glos, 170 Ill. 436, and *Harts v. People*, 171 Ill. 548, and water main cases are in accord with *Northwestern*

University v. Wilmette, supra, as far as water mains, hydrants, etc., are concerned.

It is our opinion, therefore, that the Board of Local Improvements may lay water service pipes and house drains by special tax:

- (a) Because it may make a local improvement by special tax.
- (b) Because the laying of house drains and water service pipes is a local improvement specially beneficial to the property assessed.

Very truly yours,

GEORGE F. HURLEY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Children Hitching on to Vehicles.

August 14, 1924.

HON. FRANK J. TOMCZAK, Chairman, Mayor's Safety Commission.

Dear Sir:

You have requested the Corporation Counsel to advise you whether there is any ordinance prohibiting children from hitching onto vehicles.

In reply, we beg to state that the only ordinance in the City of Chicago relative to this subject is Section 2637 of The Chicago Municipal Code of 1922, which provides as follows:

“2637. *Flipping cars.*) No minor under the age of eighteen years shall climb, jump upon, or cling to, or in any way attach himself or herself to any horse, cable, electric or other street car or any railroad locomotive or car of any kind while the same is in motion, under a penalty of not less than two dollars nor more than ten dollars for each offense.”

The aforequoted section does not purport to apply to vehicles other than street cars or railroad locomotives or cars.

There is also an ordinance prohibiting skating on the streets by children, and, inasmuch as children skating on streets frequently hitch onto vehicles, we also quote that:

“2709. *Skating on sidewalks only—except.*) It shall be unlawful for any person to skate on roller or ice skates upon any street or public way in the city, except on the sidewalks thereof, and at street intersections while crossing from one side of the street to the other.

Any person violating any of the provisions of this section shall be fined not less than one dollar nor more than twenty-five dollars for each offense.”

There is no ordinance of the City of Chicago directly prohibiting children from hitching onto vehicles. We therefore recommend, that if, in your opinion, it be desirable to prohibit such practice, an appropriate ordinance be passed at the next meeting of the council in the fall.

Yours very truly,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Construction of Bridge by Sanitary District at Crawford Avenue—Construction of Approaches by City—Power of City to Agree to Construct Approaches.

August 15, 1924.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

Your recent request for advice to the Committee on Finance in the matter of the Sanitary District's proposal

to construct a bridge, viaduct and approaches in Crawford avenue, upon an agreement by the City to later reimburse the Sanitary District for the cost of part of such improvement, has been referred to us. The case may be best presented and understood by incorporating herein your communication, which is as follows:

"There has been submitted to the Finance Committee by the Sanitary District of Chicago the proposition to proceed with the construction of the Crawford Avenue Bridge and its approaches and the viaducts over the right-of-way of certain railroad companies, proposing that the Sanitary District pay for the construction of the bridge proper and that they will also build the approaches and viaducts, the City to pay for same at some future date with interest.

"Will you kindly advise the Committee on Finance as to the City's obligation to provide such a viaduct over the tracks of the various railroads involved and its liability for payment of same, also for the cost of the approaches?

"Kindly advise the Finance Committee as to power of the City to enter into such an agreement as that proposed."

Both the City of Chicago and the Sanitary District are empowered by the Legislature to construct certain bridges. We assume, however, that this bridge, which crosses the "West Fork of the Chicago River," is properly a project within the jurisdiction of the Sanitary District, and that the District alone is to "pay for the construction of the bridge proper."

We have therefore to consider only the obligation of the City, (1) to provide and pay for the approaches to this bridge; (2) to supply and pay for the viaduct over certain railroad tracks together with its approaches near the bridge; and (3) the power of the City to enter into the proposed contract.

Such approaches to the bridge as will afford proper and reasonable connection with the avenue on both sides are technically and legally a part of the "bridge proper," and should

be constructed and paid for as parts of such bridge by the Sanitary District itself. Under the common law, and usually under the statutes in this country, a bridge includes abutments and approaches, which make it accessible and convenient for public travel.

State v. Illinois Cent. R. R. Co., 246 Ill. 188, on page 286.

Chicago v. P., Ft. W. & C. Ry. Co., 247 Ill. 319.

Chicago v. P., Ft. W. & C. Ry. Co., 248 Ill. 100.

The People v. C. & N. W. Ry. Co., 249 Ill. 170.

There can be no obligation, therefore, on the part of the City to construct or pay for any part of these approaches to the bridge itself, unless the Council, in the exercise of its power over the streets, should provide such approaches as in extent and character under the circumstances would more properly constitute street improvements than bridge approaches.

City of Bloomington v. I. C. R. R. Co., 154 Ill. 539.

Chicago v. P., Ft. W. & C. Ry. Co., 247 Ill. 319.

Chicago v. P., Ft. W. & C. Ry. Co., 248 Ill. 100.

It is said by the Supreme Court, in *Chicago v. P. Ft. W. & C. Ry. Co.*, 247 Ill., on pages 321, 323:

“A bridge includes the abutments and such approaches as will make it accessible and convenient for public travel. It has been held in some cases that whether a particular bridge includes approaches depends on the circumstances in which the word ‘bridge’ is used. (*State v. Illinois Central Railroad Co.*, 246 Ill. 188, p. 286.) What is true as to a bridge and its approaches is equally true of a viaduct and its approaches. Ordinarily an approach, as that term is used, is considered a part of the viaduct. What would be regarded as approaches would depend largely upon the demands of the traveling public and ‘upon what would be reasonable under the circumstances and local situation in each case.’ * * * What is a viaduct proper and what is an approach, where one begins and the other ends, and what is a street or highway as distinguished from the approach, are more questions of fact than of law and are sometimes not easy to decide. (*Tollard v. Wellington*, 26 Conn. 578.)”

We are informed that, to connect this bridge with Crawford avenue so as to afford reasonable and efficient facility for public travel, requires long approaches and viaducts over the several railroad tracks and canal in the vicinity, and extensive improvements in grade and width of the avenue, leaving for construction little or no "approach" proper to the bridge itself. This presents the difficulty suggested by the Supreme Court, and leaves to the discretion of the City Council the adoption of the proposed improvement as its own and to finance it as such.

The proposition to construct and pay for the viaduct over the tracks of the several railroad companies which cross Crawford avenue near this bridge presents an entirely different matter. Obviously such viaduct is not part of the approach to the bridge within the power and duty of the Sanitary District to provide. It therefore becomes a question of the exercise of the exclusive power of the City over its streets, particularly at railroad crossings.

Clause Seventh of Sec. 65, Art. V of the Cities and Villages Act expressly empowers the City

"To lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets," etc.

It has been held that such a general grant of power is not sufficient of itself to authorize a city to bridge railway tracks across a street or to maintain such a viaduct.

Schneider v. Detroit, 72 Mich. 240; 40 N. W. 329;
2 L. R. A. 54.

Phelps v. Detroit, 120 Mich. 447; 79 N. W. 640.

Vandalia Ry. Co. v. State ex rel., 166 Ind. 219;
76 N. E. 980.

In *Schneider v. Detroit*, *supra*, the court says:

"Doubtless the method of crossing a railroad by a viaduct is safer than a crossing at grade; and upon streets which are recognized thoroughfares, over which the public are almost constantly passing such bridges would greatly conduce to the public safety and convenience, and it would be wise for the Legislature to confer

upon municipalities the authority to erect such structures in the streets. * * *"

This is an instructive case and analogous in its facts to the instant case. Although the court there held that the power of the city council to construct bridges in the streets is restricted by the Michigan statute "to the purposes of sewerage or drainage and does not extend to the purpose of securing a safe crossing of a railroad track," we consider the case as authority to sustain the power of the City Council of Chicago under the Cities and Villages Act to erect and maintain the viaduct in question. By that act the power is expressly and without restriction given the Council to construct and maintain such a viaduct as here proposed. Clause twenty-eighth of Section 65, Art. V of said act empowers the City Council

"To construct, and keep in repair bridges, viaducts and tunnels and to regulate the use thereof."

The power to construct such viaducts over the railroad tracks at street crossings is still more particularly granted by the following clauses of Sec. 65, Art. V of the Cities and Villages Act (Cahill, Ill. Rev. Stat. 1923):

"Twenty-fifth. To provide for and change the location, grade and crossing of any railroad."

"Twenty-seventh. * * * To compel such railroads to raise or lower their railroad tracks to conform to any grade which may, at any time, be established by said city * * *"

L. & N. R. R. Co. v. City of East St. Louis, 134 Ill. 656.

City of Chicago v. Law et al., 144 Ill. 569, 578.

City of Chicago v. P. Ft. W. & C. Ry. Co., 247 Ill. 319.

City of Chicago v. P. Ft. W. & C. Ry. Co., 248 Ill. 100.

Schneider v. Detroit (Mich.), *supra*.

Argentine v. A. T. & S. F. R. Co. (Kan.), 30 L. R. A. 255.

Baily v. Hermosa Beach (Cal.), 192 Pac. 712.

State v. St. P. M. & M. Ry. Co., 98 Minn. 380.

Elliott, Roads & Streets, p. 28.

“There can be no doubt,” says the court in *Chicago v. P. Ft. W. & C. Ry. Co.*, *supra*, p. 322:

“that under provisions of the ordinance granting the appellant the right to construct its railway in the City of Chicago, as well as under the statutes of the State concerning the control of railways, the public authorities can compel appellant to construct and maintain proper crossings at streets, alleys and highways, or, if the safety and security of the public require, to erect and maintain viaducts with proper approaches thereto.”

See also *City of Argentine v. A. T. & S. F. R. Co.*, *supra*.

In *L. & N. R. R. Co. v. City of East St. Louis*, *supra*, p. 662, the court construed the foregoing enumerated powers of the City Council to lay out, establish and improve streets, and “to construct and keep in repair bridges, viaducts and tunnels,” and said:

“We can discover no good reason for holding that under these powers a viaduct like the one in question may not, in a proper case, be paid for by special assessment as a local improvement. The statute does not say what shall be considered a local improvement. The determination of that question is left to the city council or village board. * * * (*Fagan et al. v. City of Chicago*, 84 Ill. 227.)”

As to whether a proposed improvement is local or general and should be paid for by special assessment or general taxation, the following cases are in point:

City of Chicago v. Law et al., 144 Ill. 569.

Kuehner et al. v. City of Freeport, 143 Ill. 92.

Since the receipt of your communication there also has been referred to us the letter of Hon. A. A. Sprague, Commissioner of Public Works, together with the enclosure of a copy of the formal proposal of the Sanitary District in reference to this work, and a copy of the City Council's Resolution accepting said proposal. The Corporation Counsel is requested to draft a formal contract between the Sanitary District and the City based on said proposal and acceptance.

The proposal of the Sanitary District excepts from the payment to be made by the City the cost of the construction of the viaducts across the tracks of the railway companies. After carefully examining the proposal and investigating the facts involved in the light of the cases cited we have concluded that the City of Chicago has ample power to enter into the particular agreement here presented. Accordingly we have this day drafted a form of contract to be submitted to the parties for execution.

Very respectfully yours,

FRANCIS J. VURPILLAT,
Assistant Corporation Council.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Character of Local Improvement May Not be Changed After Passage of Ordinance.

August 18, 1924.

HON. JOHN J. SLOAN, President, Board of Local Improvements.

Dear Sir:

I received the following letter from you under date of August 11th:

"I am advised that the special assessment act says that the improvements must be built substantially, as called for in the ordinance.

Has the Court ever ruled upon the meaning of the word 'substantially'? Sundry work is under progress now, which on account of delay warrants certain changes both in method of construction and materials used, and as 80 per cent or more of the work has been done in compliance with the ordinance, we would like to know if the changes that should be made, in order to expedite

the work for the remaining 20 per cent of it, would comply with the ordinance.

Please bear in mind that the contemplated changes render the work even more substantial and better than originally contemplated, besides aiding in public relief to one quarter of a million people, who now suffer because of a lack of communal activities.

Yours very truly,

(Signed) J. J. SLOAN."

After all the preliminary steps are taken in the proceeding—that is to say, after the public hearing has been held, the first resolution adopted, the completion of the engineer's estimate of cost and the passage of the ordinance authorizing the improvement, no material change can be made in the character of the improvement.

Our Supreme Court has frequently held that the cost of the improvement to be assessed against the property owners is the cost fixed in the estimate of the engineer and the improvement provided for in the ordinance must be the improvement recommended by the Board of Local Improvements.

Wetmore v. City of Chicago, 206 Ill. 372.

Clarke v. City of Chicago, 185 Ill. 354.

Bickerdike v. City of Chicago, 203 Ill. 636.

It is a well established principle of law in this State that the provisions of the Local Improvement Act with reference to special assessments must be strictly followed irrespective of the fact that the failure to observe such provisions has resulted in any injury or any inconvenience to the property owner, and so, if there is a material difference between work provided for in the resolution and that included in the engineer's estimate, the variance is substantial, whether the estimate is for MORE OR LESS work than is provided for in the resolution.

Chicago Heights v. Angus, 267 Ill. 628.

City of Chicago v. Terwilliger, 253 Ill. 395.

Smith v. City of Chicago, 214 Ill. 155.

Highland Park v. Gail, 276 Ill. 23.

It would be dangerous in my opinion to deviate in any substantial way in the construction work from the provisions of the resolution, ordinance and estimate of the engineer. Any property owner can come in at the filing of the final certificate and raise objections that the court could not help but sustain.

Respectfully submitted,

PHILLIP J. McKENNA,
Attorney, Board of Local Improvements.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Property Lying Between Wilson Avenue, Lakeside Avenue, Clarendon Avenue and Lake Michigan
—Public's Right of Access to Water.**

August 19, 1924.

HON. F. J. LINK, Alderman Forty-eighth Ward.

Dear Sir:

We have your communication of August 2, 1924, requesting an opinion and information concerning the captioned property so that the people's rights may be protected.

You state that it is claimed that this property is part of Section 16 and therefore rightly belongs to the Board of Education. It is a part of the fractional N. W. $\frac{1}{4}$ of Section 16, and consequently the proceeds of its sale went to the School Fund. The records would indicate that the Governor of this State by patent has conveyed in fee all of that part of Section 16 referred to in the caption. Lot 1 of School Trustees Subdivision lies east of Clarendon avenue, that is, if Leland avenue were extended to the lake it would cross Lot 1. Eastwood avenue extended would cross Lot 2. These

original lots have not been subdivided and have no streets except that they form a part of the east half of Clarendon avenue. The Tract Book shows that the title to the premises is held of record by Davis S. Klafter, excepting 149 feet on Clarendon avenue immediately north of Wilson avenue. The City has no riparian rights anywhere on the premises.

It would seem that the tenant of Lot 1 has erected a wire netted fence some six or eight feet east of the eastern edge of Clarendon avenue and entirely on the premises of Lot 1. The fence does not interfere with any of the City's rights, nor any of the rights of the general public, and is not subject to regulation on the part of the City.

Yours very truly,

FRANK T. HUENING,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Temporary Appointment Under Civil Service—Salary of Temporary Appointee—Bond.

August 20, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

You have requested an opinion from the Corporation Counsel as to whether you should procure a bond for \$25,000 covering Joseph J. Ward, Acting Superintendent of Water. It appears that the former Superintendent of Water has died, and that pending the vacancy, the Commissioner of Public Works has appointed Joseph J. Ward to take his place. It further appears that the said Joseph J. Ward is at present under bond of \$10,000 as Field Assessor in Charge, Bureau of Water.

The Civil Service Act, relative to temporary appointments in case of emergency, provides in Section 10 as follows:

“To prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department or office may, with the approval of the commission, make temporary appointment to remain in force not exceeding sixty days and only until regular appointment under the provisions of this act can be made.”

The Civil Service Rules providing for temporary appointments in cases of emergency provide in Section 6 of Rule IV as follows:

“Section 6. *Temporary appointment.* When it is necessary to make temporary appointments, appointing officers shall request and receive written notice of same from the Commission before persons are so employed. In cases of bona fide emergency where the appointing officer can show the necessity for immediate appointment, same may be made subject to the approval of the Commission.”

Upon investigation we learn that the Commissioner of Public Works has not secured the approval of the Civil Service Commission to the appointment of Mr. Ward. We are of the opinion that the only way in which a temporary appointment may be made to fill a vacancy pending promotion to that office by the Civil Service Commission after examination is to comply with the aforesaid rule of the Civil Service Commission and secure their approval for the temporary appointment. Having secured such approval to this appointment, the said Joseph J. Ward should be paid the salary which attaches to the position of Superintendent of Water for such time as he may occupy said position under temporary appointment. The former bond of \$10,000 for his former position should be cancelled, and his new bond should be taken out covering him in his temporary position as Superintendent of Water.

The rules of the Civil Service Commission also provide that when a temporary appointment has expired, and in this connection it may be noted that a temporary appointment

may not be made for a period to exceed sixty days, that the person temporarily appointed shall return to his former position, and shall have the same rights of seniority he formerly enjoyed.

Very respectfully,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Speed of Passenger Motor Buses.

August 20, 1924.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

You have transmitted to this office a communication from Mr. Hugo Meyer, Manager of the Illinois Automobile Club, requesting that the law be enforced relative to the speed of motor buses, and suggesting that the law is that motor buses may not operate at a greater rate of speed within the city than twelve (12) miles per hour. Said communication was addressed to Honorable Robert E. Crowe, State's Attorney. The State's Attorney has transmitted the same to you, and you request this office for an opinion as to what action, if any, the Police Department should take in the matter.

The following sections of "An Act in relation to motor vehicles and to repeal a certain Act therein named," approved June 30, 1919, in force January 1, 1920, which relate to the speed of motor buses are as follows:

"Section 2. This Act shall be known as the 'Motor Vehicle Law,' and may hereafter be referred to by that designation. For the purposes of this Act, motor vehicles as a class shall be divided into two divisions, viz:

First: Those vehicles which are designed and used for the carrying of not more than seven persons.

Second: Those vehicles which are designed and used for pulling or carrying freight and also those vehicles or motor cars which are designed and used for the carrying of more than seven persons."

"Section 22. No person shall drive a vehicle of the first division as described in section 2 of this Act, upon any public highway in this State at a speed greater than is reasonable and proper having regard to the traffic and the use of the way or so to endanger the life of limb or injure the property of any person. If the rate of speed of any motor vehicle or motor bicycle of said first division, operated upon any public highway in this State where the same passes through the closely built-up business portions of any incorporated city, town or village exceeds ten (10) miles an hour, or if the rate of speed of any such motor vehicle or motor bicycle operated on any public highway in this State where the same passes through the residence portions of any incorporated city, town or village exceeds fifteen (15) miles an hour, or if the rate of speed of any such motor vehicle or motor bicycle operated on any public highway in this State outside the closely built-up business portions and the residence portions within any incorporated city, town or village exceeds twenty (20) miles an hour or upon any public highway outside of the limits of an incorporated city, town or village, if the rate of speed exceeds thirty-five (35) miles an hour, such rates of speed shall be *prima facie* evidence that the person operating such motor vehicle or motor bicycle is running at a rate of speed greater than is reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person. If the rate of speed of any such motor vehicle or motor bicycle operated on any public highway in this State in going around a corner or curve in a highway where the operator's view of the road traffic is obstructed exceeds eight (8) miles an hour, such rate of speed shall be *prima facie* evidence that the person operating such motor vehicle or motor bicycle is running at a rate of speed greater than is reasonable having regard to the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person."

“Section 23. The speed of all vehicles of said second division, as described in section 2 of this Act, shall always be reasonable and safe and be governed, as near as may be, by the general requirements of section 22 of this Act, but such speed shall not exceed the following rates, to wit:

(1) Vehicles having a gross weight of five thousand (5,000) pounds and less, including the weight of the vehicle and maximum load, if equipped with pneumatic tires or cushion wheels, 25 miles per hour; if equipped with two or more solid rubber tires, 20 miles per hour.

(2) Vehicles designed and used for the carrying of more than seven passengers and having a gross weight of more than five thousand (5,000) pounds and not more than twelve thousand (12,000) pounds, including the weight of the vehicle and maximum load, if equipped with pneumatic tires or cushion wheels, twenty-five miles per hour; vehicles designed and used for pulling and carrying freight and having a gross weight of more than five thousand (5,000) pounds and not more than twelve thousand (12,000) pounds, including the weight of the vehicle and maximum load, if equipped with pneumatic tires or cushion wheels, twenty miles per hour; in either case if equipped with solid rubber tires, fifteen miles.

(3) Vehicles designed and used for the carrying of more than seven passengers and having a gross weight of more than twelve thousand (12,000) pounds, and not more than fifteen thousand (15,000) pounds, including the weight of the vehicle and maximum load, if equipped with pneumatic tires, or cushion wheels, twenty-five miles per hour; vehicles designed and used for pulling and carrying freight and having a gross weight of more than twelve thousand (12,000) pounds, and not more than fifteen thousand (15,000) pounds, including the weight of the vehicle and maximum load, if equipped with pneumatic tires, or cushion wheels, fifteen miles per hour; in either case, if equipped with solid rubber tires, twelve miles per hour.

(4) Vehicles having a gross weight of more than fifteen thousand (15,000) pounds, including the weight of the vehicle and maximum load, 12 miles per hour.

As amended by L. 1923, p. 552, passed June 29, in force July 1.

“Section 24. The above regulations in section 23 are subject to the following modifications, to wit:

(1) Restrictions as to weight and speed shall not apply to vehicles run upon rails or tracks or to police vehicles, fire engines, fire trucks, or voluntary fire departments.

(2) Upon application to the highway or street officials having proper jurisdiction over a particular highway, special permits in writing may be granted for the moving of heavier vehicles, or objects on wheels, subject to such conditions as such highway or street officials may prescribe. On all highways under the control of, or required to be maintained in whole or in part, by the State such permission shall be obtained from the Department of Public Works and Buildings.

(3) At the season of the year when the frost is leaving the ground, highway officials having proper jurisdiction, may, on definitely designated highways, prohibit the operation of vehicles having a gross weight, including the weight of vehicle and load, of more than 5,000 pounds, by posting notices along such roads; *Provided, however*, that the entire time of such embargo shall not exceed forty-five days in any one year.”

It should be observed that motor buses are included within the second division of vehicles as defined by section 2 of the above quoted statute. Section 23 of the above quoted statute regulates the speed of vehicles of the second division, and it is therein provided that the speed of vehicles having a gross weight of more than fifteen thousand (15,000) pounds, including the weight of the vehicle and maximum load, shall not exceed twelve (12) miles per hour.

It is true that in the rates of speed prescribed in section 22 for vehicles of the first division, it is provided that the operation of vehicles at a rate of speed greater than certain and specified rates in certain districts, shall be *prima facie* evidence that the vehicle is being operated at a rate of speed greater than is reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person. Therefore, under section 22, prescribing the rates of speed for vehicles of the first division, the operation of said vehicle at a rate of speed

greater than the prescribed limits is only *prima facie* evidence that the law is being violated. In other words, the presumption arises that the vehicle is being operated at a greater rate of speed than is reasonable and proper, and the burden is put upon the person so operating the vehicle to prove to the satisfaction of the court that such speed was reasonable and proper.

In section 23, which regulates the rates of speed of vehicles of the second division, however, there is no provision that the operation of said vehicles at a greater rate of speed than that mentioned in the statute shall be *prima facie* evidence that the law is being violated. There is only a specific, mandatory provision that the speed of such vehicles *shall not exceed certain rates*.

We are, therefore, of the opinion that the operation of a motor vehicle, designed and used for the carrying of not more than seven passengers over the public highways of an incorporated city, at a rate of speed of more than ten miles an hour in the closely built up business portions, or more than fifteen miles in the residence portions, or more than twenty miles outside of the closely built up business and residence portions, is *prima facie* evidence that such speed is unreasonable and dangerous, and that the operation of a motor bus having a gross weight of more than 15,000 pounds (including the weight of the vehicle and maximum load) at a rate of speed greater than twelve miles an hour is in violation of the State Motor Vehicle Act.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Use of Vehicle Tax Funds for Lowering Floor of Subway at Lawrence Avenue Between Broadway and Winthrop Avenue.

August 25, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

You have informed the Corporation Counsel that on July 15, 1924 (Council Proceedings of said date, page 3614), an ordinance was passed directing the Commissioner of Public Works to lower the floor of the subway in Lawrence avenue between Broadway and Winthrop avenues, under the tracks of the Chicago, Milwaukee & St. Paul Railway Company, and to make other necessary adjustments in the grades of the sidewalks, curbs, alley returns and driveways. You have further informed us that the aforementioned ordinance was approved by the Illinois Commerce Commission in an order rendered June 24, 1924. The City Council, in its Annual Appropriation Bill for 1924, failed to appropriate money to defray the cost of the work involved, which you estimate to amount to \$23,000.00. You have requested this office for an opinion as to whether the funds derived from the Vehicle Tax Fund may be used for this purpose.

Section 96 of Article V of the Cities and Villages Act, which authorizes the City to provide for a Vehicle Tax Fund, and to expend the same, is as follows:

“Ninety-sixth. To direct, license and control all wagons and other vehicles conveying loads within the city, or any particular class of such wagons, and other vehicles, and prescribe the width and tire of the same, the license fee when collected to be kept as a separate fund and used only for paying the cost and expense of street or alley improvement or repair.”

Pursuant to the authority granted by the aforequoted statute, the following ordinance of the City of Chicago pro-

vides for application of revenues derived from license and transfer fees:

"4071. Application of revenues.) All revenues derived from such license and transfer fees shall be kept as a separate fund and used for paying the cost of street and alley improvement and repair.

The city collector shall keep a separate account by wards showing the amount of revenue obtained from each ward in which any vehicle not drawn by animal power is kept when not in use, and in which any animal or animals are kept drawing any wagon or vehicle for which a license is procured under the provisions of this article.

Fifteen per cent of the total revenues thus obtained shall be set aside, to be expended in the discretion of the commissioner of public works and under his direction, for the repair of such streets upon which there is an unusually heavy amount of traffic.

So much of the remaining eighty-five per cent of the revenues obtained from each ward, as, in the discretion of the commissioner of public works, may be needed for immediate use, shall be expended under the direction of said commissioner for the repair of streets and alleys in such ward, and the balance thereof shall remain to the credit of such ward account to be used as occasion requires."

We are of the opinion that according to the last paragraph of the aforequoted section of the Code, the Commissioner of Public Works may properly spend, in his discretion eighty-five per cent of the revenues obtained from the ward in which the proposed improvement is located, upon the said improvement. If this fund is sufficient, it may be so employed. If, however, the fund is not sufficient, the improvement should not be attempted.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Expenditure by Fire Commissioner of Sum Appropriated for Rehabilitation of Fire Department Buildings.

August 25, 1924.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

You have requested an opinion relative to your authority to enter into contracts for the rehabilitation and repair of fire station buildings, and to expend, in your discretion, the sum granted you for that purpose by the Annual Appropriation Bill of the City of Chicago for the year of 1924.

The Annual Appropriation Bill provides under the account known as 35-X the following:

“For the remodeling of existing fire department buildings or the replacement thereof with new buildings on the same or new locations, including the purchase of necessary property; This work is to be done subject to the approval by City Council of a plan for relocations of fire stations resulting from a survey of the locations of stations in respect to fire hazards, the execution of said plan to cover a period of five (5) years, beginning with the year of 1924. The extent and character of work for the year of 1924 shall be fixed by the City Council and the amount herein appropriated for expenditure in 1924 shall be expended only on further order of the City Council—\$100,000.00.”

On July 15, 1924, and appearing on page 3536 of the Council Proceedings of said date, was passed the following order:

“Ordered, that the Fire Commissioner be and he is hereby authorized and directed to expend the appropriation heretofore set up under account 35-X in the necessary repair and rehabilitation work of fire station buildings, and the Comptroller is authorized to pass vouchers against said appropriation when properly approved by the Fire Commissioner.”

The aforequoted council order gives the Fire Commissioner a general approval to expend the amount appropriated by Paragraph 35-X of the Annual Appropriation Bill, and he may do so without any further authorization of the City Council, provided, of course, that the purpose of the expenditures is that contemplated by the aforequoted section of the Annual Appropriation Bill.

All contracts for such work should be entered into by the Fire Commissioner according to the procedure outlined in the Fire Department Ordinance. In other words, when the contracts are for greater amounts than five hundred dollars, bids may be received by the Fire Commissioner after advertising in the same manner as is provided for the letting of similar contracts in the Department of Public Works. If the contracts are for smaller amounts than five hundred dollars, they should be entered into by the Purchasing Agent of the City.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Whether Owner or Person in Possession of Property
May Sign Frontage Consent Petition—Corporation
Does Not Have To Sign Under Seal.**

September 4, 1924.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

We are in receipt of your letter, dated September 2d, transmitting a frontage consent petition and verification report thereof for the erection of a garage at Nos. 6139-6145

Calumet avenue, together with a petition of protesting property owners, who own property fronting on Calumet avenue between East 61st street and East 63d street. In your letter, you ask our advice relative to the revocation of a permit for the construction of said garage issued to Mr. A. Weiss on July 16, 1924.

In the verification report of the Bureau of Maps and Plats, the total frontage on both sides of Calumet avenue on the *block* between East 61st street and East 63d street (the space between East 61st street and East 63d street constitutes a "block" within the meaning of Section 929 of The Chicago Municipal Code of 1922, relative to frontage consents for garages since East 62d street is not open to the public at this place) is found to be 2524.53 feet. The frontage consent petition is signed by the Chicago Rapid Transit Company, through B. J. Fallon, Vice President, for 1262.24 feet of frontage, and by Searle E. Barnett for 25 feet of frontage. Said petitioners therefore represent 1287.24 feet of frontage which is a clear majority of the total frontage, provided said signatures are valid.

The grounds of objection stated in the petition of protesting property owners are as follows:

"1. West side of Calumet from 61st to 63d streets has been used for seven years as a small park, and at the present time is used and kept up by the Small Parks Commission of the City of Chicago and signature of the Small Parks Commission or the City of Chicago who pays for its upkeep should be obtained in place of the Elevated Road, until used by them for railroad purposes. This parkway represents a twenty thousand dollar investment, and its usefulness will be destroyed by this garage.

2. The signature of the officer signing for the Elevated Road should be attested to by the secretary of Company with seal.

3. Copy of authorization from Board of Directors of Elevated Road giving authority to officers to sign for garage on this location should be attached to petition.

4. Only 1 per cent total frontage was legally represented on petition."

Section 929 of The Chicago Municipal Code of 1922 provides that frontage consent petitions shall be signed by the "majority of *property owners* according to frontage on both sides of the street." As checked and certified by the Bureau of Maps and Plats, The Chicago Rapid Transit Company is the owner in fee of lots and parcels of land on the west side of Calumet avenue between East 61st street and East 63d street, having a frontage of 1262.24 feet on Calumet avenue. We are of the opinion that such ownership makes said Company the proper party to sign such frontage consent petition, and that it is immaterial to what use said lands may, with the consent of such Company, be devoted by others as licensees or tenants thereof. This disposes of the first objection.

The second objection is purely technical. The rule that corporations should act under their corporate seals has been much relaxed in this state. In *Green v. Blodgett*, 159 Ill. 169, the court said (p. 174) :

"We are also of the opinion that if the corporation had the power to make the instrument in question it was not essential to its validity to have the corporation seal attached. It is no longer the law that a corporation is bound by its contracts only when made under its corporate seal. The rule now is, that a corporation may bind itself, in a matter within its charter powers, by a writing not under seal to the same extent as an individual may."

In *New England Fire and Marine Insurance Co. v. Schettler*, 38 Ill. 166, it was stated that "The notion that a corporation can only act under their corporate seal and by their president and secretary has become obsolete." In *Blodgett v. Green*, 55 Ill. App. 556 (this being another trial between the same parties before mentioned) it was held that a seal is only required on corporate contracts when the same would be required on the contracts of natural persons. In *Snyder v. Bailey*, 165 Ill. 447, it was held that a corporate seal was not necessary to the validity of warrants of attorney. The court said (p. 453) :

“The question in this case may therefore be said to be, are the warrants of attorney upon which these judgments were confessed valid upon their face, or is it necessary, in order to make them *prima facie* valid, that the seal of the corporation or other evidence of authority to execute them should appear? We think the warrants, being executed by officers recognized by the law as proper persons to do so if authorized, there being nothing to show such authority or the absence thereof, are *prima facie* valid. We do not think it can be seriously contended that these powers of attorney are void upon their face, because to so hold would be to say that powers of attorney to confess judgment could only be executed by corporations, under their corporate seal, and for this we are unable to find any authority.”

It is also settled law in this state that the signature of a property owner may be attached to a frontage consent petition by his agent, and that it is not necessary for the authority of said agent to appear upon the face of the petition, provided sufficient authority has in fact been given to such agent. *North Chicago Street Railroad Company v. Cheetham*, 58 Ill. App. 318; *Tibbetts v. The West and South Towns Street Railway Company*, 153 Ill. 147. In the latter case, the court said (pp. 153-154):

“Appellant’s theory seems to be,—and on that theory alone he attacks the validity of these ordinances,—that the petitions are invalid because they show on their face that the names of some of the signers were signed by agents, and the agents’ authority does not appear on or with the petitions themselves, and that without such signatures the petitions would not contain the requisite signers. It is not alleged that any name was signed without authority, but simply that the authority does not appear on or with the petitions. * * * If it be conceded, as contended by counsel for appellant, that the statute requires a written petition, it does not follow that the authority of the agent who signs the name of his principal to such petition must also be in writing, or, if in writing, that it should accompany the petition. There is nothing in the statute changing the common law rule by which an agent may sign the name of his principal to a writing under authority not in writing.”

We think, therefore, that the signature of the Chicago Rapid Transit Company by Mr. B. J. Fallon, its Vice President, is *prima facie* a valid signature which was properly relied upon in the issuance of said permit of July 16th, and that objections two and three are without substantial merit. The fourth objection stated in the petition of the property owners is only a conclusion drawn from the former objections to the signature of said Chicago Rapid Transit Company.

In conclusion, we are of the opinion that the frontage consent petition submitted and duly verified was sufficient to authorize the issuance of said permit, and that you have no authority to revoke the same.

Yours very truly,

C. M. DOTY,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,

Corporation Counsel.

Contracts for Supplying of Fire Department with Coal To Be Made by Commissioner of Public Works.

September 4, 1924.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

You have requested this office for an opinion as to whether your department or the department of public works should enter into contract for the supplying of the Fire Department with coal.

Section 3212 of The Chicago Municipal Code of 1922, relative to the duties of the Commissioner of Public Works provides "that he shall award and execute all contracts * * * for coal for the use of any department of the city." It is true that Section 1165 of the Fire Department Ordinance, passed May 21, 1924, is a general provision granting

power to the Fire Commissioner to enter into contracts for greater sums than \$500.00. However, we do not believe there is any conflict between these two sections, because the express and specific grant of power in the ordinance relative to the Commissioner of Public Works providing that he shall award and execute all coal contracts for any department of the City, is controlling. The section in the Fire Department Ordinance relative to contracts is general, gives the fire commissioner power to award and execute contracts generally, unless the power to award a certain kind of contract is specifically given to some other department head by ordinance. Therefore, we are of the opinion that all contracts for coal for the Fire Department should be made by the Commissioner of Public Works, as heretofore.

You state in your communication that the custom has been to make requisitions on the Bureau of Engineering. Since the Bureau of Engineering is a branch of the Department of Public Works, and under direction and control of the Commissioner of Public Works, it is legal for the Commissioner of Public Works to adopt that procedure in the letting of coal contracts.

Respectfully submitted,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Payment of Salary to Civil Service Employee Who Has Been Unlawfully Removed.

September 4, 1924.

HON. MARTIN J. O'BRIEN, Comptroller.

Dear Sir:

In a communication addressed to this office, dated April 20, 1924, you have set forth the following facts:

In the Annual Appropriation Bill for the year 1924 an appropriation was made in the Electrical Department for Chief, Fire Alarm Wires—\$3,780.00 and for Superintendent of Construction—\$3,900.00. On April 15, 1924, an ordinance was passed (C. P., pg. 2629), which reads as follows:

“That the Fire Commissioner be and he is hereby authorized to employ on and after April 1, 1924, under Account 35-A-11, one Superintendent of Construction at \$3,900.00 per annum and Chief of Fire Alarm Wires at \$3,780.00 per annum, said employees to be detailed to the Department of Gas and Electricity; provided that the expenditures under this authority do not exceed the appropriations heretofore made under said account.”

It appeared that the appropriations under Account 35-A-11 were not available for use at that time, since all the employees therein provided for were employed. Then, under date of July 15, 1924 (C. P., pg. 3536) the City Council passed the following order:

“Ordered, That the Fire Commissioner be and he is hereby authorized to carry on the Fire Department payroll, the Superintendent of Construction and the Chief, Fire Alarm Wires, who have been employed in the Fire Department and assigned to the Department of Gas and Electricity and who have been covered by the Fire Department Pension Act, said rolls to be certified by the Fire Commissioner, based upon time rolls certified by the appropriate official of the Department of Gas and Electricity. The employees named are to be assigned to duty in the Department of Gas and Electricity by special order of the Fire Commissioner and to be subject to all the rules and requirements of the Department of Gas and Electricity as to duties, discipline, etc., payrolls for said employees to be paid out of appropriations made for these positions in the Department of Gas and Electricity.”

In accordance with the above order, the Fire Commissioner has assigned for duty in the Department of Gas and Electricity, the Civil Service employee holding the position of Superintendent of Construction and the Civil Service employee holding the position of Chief, Fire Alarm Wires. The

Commissioner of Gas and Electricity has assigned to duty the Chief, Fire Alarm Wires, but has refused to assign the Superintendent of Construction. It appears that a different employe has been performing the duties of Superintendent of Construction in the Department of Gas and Electricity.

You have requested an opinion whether, under the afore-stated facts the Comptroller is justified in paying any salary to Mr. Leser, the Civil Service employe holding the title of Superintendent of Construction and who has been assigned to Commissioner of Gas and Electricity by the Fire Commissioner.

We have taken the matter up with the Commissioner of Gas and Electricity and he states that the position of Superintendent of Construction is at the present time filled by another employe. However, investigation shows that Mr. Leser has never been removed from this position according to law as provided in the Civil Service Act, nor has the present occupant of said position been promoted to that position according to law. Until Mr. Leser is so removed, he retains his Civil Service standing as Superintendent of Construction, and is entitled to the salary attached thereto. Needless to say, the employe who has been temporarily assigned to that position by the Commissioner of Gas and Electricity is not entitled to draw the salary attached to the position of Superintendent of Construction.

We therefore advise you that Mr. Leser is entitled to the salary of Superintendent of Construction as above set forth until such time as he may be removed according to law.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

**Power of City to Co-operate with C. M. & St. P. R. R.
Co. in Financing Certain Track Elevation.**

September 4, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

On April 5, 1924, you addressed a request to this Department for an opinion as to the suggestion made by the Chicago, Milwaukee & St. Paul Railway Company, for the co-operation of the City in the financing of their track elevation work in connection with the so-called Mayfair Track Elevation Ordinance.

We have given careful consideration to the suggestions made, and because of the importance of the question and its novelty so far as the City of Chicago is concerned, we have treated the matter quite extensively.

We shall deal with the legal questions presented first.

The first question which arises is whether this improvement can be legally construed as a "public improvement" and we find in our State Constitution that Section 12 of Article XI declares railways to be "public highways":

"Railways heretofore constructed, or that may hereafter be constructed, in this State are hereby declared public highways, and shall be free to all persons for the transportation of persons and property thereon, under such regulations as may be prescribed by law."

Railway rights-of-way being recognized as public highways, the municipality in eliminating dangerous grade crossings through track elevation improvements for the protection of persons traveling thereon as well as for the safety of those crossing such highways, can be safely regarded as engaging in public improvement.

In many states of the union, municipalities have shared the cost of track elevation improvements with the railroad

companies. As recently as March 3, 1924, the Governor of the State of New York, in a message to the State Legislature, sought its approval to a plan whereby the State should issue bonds in the sum of \$400,000,000.00 to be utilized for the purpose of eliminating grade crossings throughout the State, and recommended that the reimbursement to the State for this outlay of money should be borne equally by the railroads benefited, the State and the City.

The twenty-fifth clause of the powers granted to the City Council by the Cities and Villages Act, reading:

“(The City shall have power) to provide for and change the location, *grade*, and crossings of any railroad.”

in our opinion, authorizes the municipality to provide or assist in providing the means whereby the grade of railroads can be changed to a plane guaranteeing safety to its residents.

In *Chicago v. P. C. C. & St. L. Ry. Co.*, 244 Ill. 229, the track elevation ordinance granted by the City and accepted by the Company was regarded as a binding contract.

There is an existing, binding contract-ordinance between the Chicago, Milwaukee & St. Paul Railway Company and the City of Chicago for the construction of the improvement, now under consideration. Section 15 of this contract-ordinance gives to the City the right and power to do the work at the expense of the Company in event of failure on the part of the Company to comply with the provisions of the ordinance. The City has the undoubted right to enforce this default clause (Section 15), do the work itself, and bill the Company the cost thereof from month to month as the work progresses. If it is agreed that this could be done, then there could be no objection to the reimbursements being arranged for in year to year payments, as being more practical and expedient than the monthly plan. (The Company, I am informed, would be willing to post collateral to guarantee that payments would be made when due.)

This procedure is similar to the Buffalo plan and in practice here has had precedents in the construction of the Lake street and Wells street bridges.

While there is no legal obstacle to the adoption of the plan proposed, the City's financial ability to engage in such an undertaking, involving the expenditure of approximately \$5,000,000.00, must be considered.

The City Comptroller, under date of July 1, 1924, renders a statement (estimated) herewith condensed, which shows under the City's constitutional debt-incurring powers and limitations the following figures:

Unexercised bonding power	\$26,855,258.60
Bonds authorized unsold	24,584,300.00
Available for future issues	\$2,270,958.60

While this balance is not sufficiently large to cover the cost of the contemplated improvement, there is no legal prohibition against the City's authorizing a referendum to the people of a bond issue over our debt-incurring limitations, just so long as the actual expenditures do not exceed the \$2,270,958.60, which is the estimated balance as of July 1, 1924. However, in this connection, it may be said that this balance will be materially increased next year by the retirement of outstanding bonds which would permit of the use of the entire bond issue as authorized.

Should you be of the opinion that this track elevation should be financed in this way, it would, of course, be necessary that the City Council pass an ordinance declaring a default against the Chicago, Milwaukee & St. Paul Railway Company and pass an ordinance providing for an appropriation of \$5,000,000.00 in the Fund for General Corporate Purposes to be expended for the completion of the Mayfair Track Elevation from the proceeds of a bond issue (if approved at a referendum).

Respectfully yours,

FRANCIS X. BUSCH,

Corporation Counsel.

Pension Rights of Policeman Who Has Served in the Fire Department.

September 9, 1924.

MR. GEORGE C. SIKES, Secretary, The Retirement Board of
The Policemen's Annuity and Benefit Fund.

Dear Sir:

Your letter of August 6th states that James R. Rattigan had six years' continuous service in the Fire Department of the City of Chicago, terminating July 8, 1924; that on the latter date he had become a member of the Chicago Police Department.

Section 41 of the Policemen's Annuity and Benefit Fund Act provides that any service rendered by any policeman while not in the Police Department of such city as a regular member of the paid Fire Department of such city shall be counted for annuity and benefit purposes under the provisions of the Act as if such services were rendered as a policeman of such city, and that any salary received by any policeman for any such service in such Fire Department shall be treated, for the purposes of this Act, in the same manner as though such salary was received for the performance of duty as a policeman.

It was apparently the intention of the legislature that a fireman transferring to the Police Department should be considered in the same category as though he had always been in the Police Department. This would entitle Mr. Rattigan to be treated as a present employe and not as a future entrant.

The reference in Section 41 to the salary undoubtedly has reference to the computation of his prior service annuity under Section 19 of the Policemen's Annuity and Benefit Fund Act. There does not appear to be any other reason for referring to the salary received by any policeman in the Fire

Department being treated in the same manner as though such salary had been received for the performance of the duties of a policeman.

It was the evident intention of the legislature that a fireman transferring to the Police Department should not lose the benefit of his prior service to the city, and, to that end, the legislature provided that for all annuity and benefit purposes under the provisions of the Act, a fireman so transferring shall be treated as though his service had been rendered as a member of the Police Department.

I am of the opinion that Mr. Rattigan is entitled to be credited with the contributions provided for present employes by Section 19 of the Policemen's Annuity and Benefit Fund Act.

Yours respectfully,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Validity of Ordinance Requiring All License Fees To Be Paid in Advance of the Granting of the License.

September 12, 1924.

HON. JOSEPH O. KOSTNER, Chairman, Committee on Local Industries, Streets and Alleys.

Dear Sir:

There was recently referred to us the request of your committee for an opinion on the validity of an ordinance passed July 2, 1923, Council Proceedings, page 769. This ordinance requires all license fees to be paid in advance of the granting of the license. Section 2414A of The Chicago Municipal Code of 1922, provides that "All applications

for a license, made to the City Collector, shall, after approval by the Commissioner of Buildings as to compliance with the zoning ordinance, be accompanied by the full amount of the fee payable for such license." Provision is also made that neither such payment nor the receipt issued therefor shall be construed as the issuance of a license. Section 2414B makes provision for the refunding of such license fee in case the application is not approved, and also for the issuance of a provisional license by the Mayor pending action by the department having jurisdiction.

All of the provisions of this ordinance pertain to the single subject matter of the payment of the license fee with the application for the license, and the ordinance must therefore be held to be valid or invalid as an entirety. This ordinance is declared to be amendatory of The Chicago Municipal Code of 1922 by the addition of the two sections above referred to, and must therefore be construed as part of the original license ordinance, which comprises sections 2410 to 2447, both inclusive, of the Code.

The original section 2414 provides that "All applications for *licenses of any character whatsoever*, except those licenses specifically excepted, shall be made in writing on a blank provided for that purpose, to the city collector." And the amendatory section, 2414A, requires all applications for licenses to be accompanied by the full amount of the fee payable for such license. These provisions apply to "licenses" imposed solely for revenue purposes and licenses exacted in the exercise of the police power. In reference to these two purposes for requiring licenses, the Supreme Court said:

"It is true that, in order to be effectual, a license must confer authority to do that which without the license would be illegal; but it does not follow that only such occupations as might be inhibited or regulated under the police power, * * * may be required to take out licenses in order to legally transact business. The occupation may be lawful in itself, and not subject to prohibition or regulation by the state, yet it may be prohibited, in order to compel the taking out of a license,

if the purpose is to raise revenue by means of license fees."

Banta v. City of Chicago, 172 Ill. 204.

Price v. People, 193 Ill. 114.

Cooley on Taxation (4th Ed.), Ch. 28, Section 1679.

The validity of the ordinance, therefore, is not made to depend upon whether the license fees are exacted for purposes of revenue or regulation. It is rather a question as to how the collection of such fees may be made and enforced.

By the Fourth clause of Section 1, Article V of the Cities and Villages Act (Cahill's Ill. R. S. 1923), the Council is empowered "To fix the amount, terms and manner of issuing and revoking licenses." This grant of power, though quite general and unrestricted in its terms, may not, in itself, be decisive of the question here involved. The precise question seems not to have been presented to our Illinois courts. There may be involved in the matter of these license and tax exactions the constitutional limitation upon the legislative power and the constitutional guaranties to the citizen of the free exercise of his personal and property rights.

Butchers' Union Slaughter House Co. v. Crescent City Live-Stock Landing Co., 111 U. S. 746, 4 S. Ct. 652.

Bessette v. People, 193 Ill. 334.

Douglas v. People, 225 Ill. 536.

This is recognized by the Supreme Court in a case attacking the license fee laid on employment agencies. In that case the court said:

"What amount the applicant for a license shall be required to pay as a license fee is plainly committed to the general assembly for determination; and the action of that department of the state government is conclusive, except, beyond serious doubt, it is manifest that the amount of the fee has been in any particular instance established, not with regard to the purpose of regulation of the occupation with the view of protecting the public welfare, but with the real purpose to raise revenue under the guise of the police power or to subvert the proper exercise of that power to the prohibition, by

means of oppressive license fees, of the right of the citizen to exercise a lawful calling, in violation of the constitutional guaranties against the destruction of the liberty and property right of a citizen."

Price v. People, 193 Ill. 114, 120.

Although this case was overruled by the Supreme Court, the dictum here quoted is in fact strengthened by the overruling case in which it is said:

"In the case of *Price v. People*, 193 Ill. 114, the validity of section 10 only of the Free Employment Agency Act was passed upon. * * * The case of *Price v. People*, *supra*, was decided in October, 1901, and the rehearing therein applied for was denied on December, 1901. Since that time, to wit: in March, 1902, the Supreme Court of the United States has announced its decision in *Connolly v. Union Sewer Pipe Co.* (184 U. S. 541), and the latter case holds that legislation, containing such an exception as Section 8 of the act of April 11, 1899, is in contravention of the fourteenth amendment of the constitution of the United States. As the Supreme Court of the United States is paramount authority upon all questions relating to the interpretation of the constitution of the United States, we feel it to be our duty to follow the holding of that court to the effect that such legislation, as is here under consideration, is a violation of the fourteenth amendment. (*Mapes v. Scott*, 94 Ill. 379.) Therefore the case of *Price v. People*, *supra*, is overruled.

Mathews v. The People, 202 Ill. 389.

The amendatory ordinance requires the payment of the fee in advance, as a condition precedent to the granting of the license and to the right to engage in the occupation for which the license is sought, whether such fee is levied as a tax for revenue on a lawful occupation or is exacted as a license fee in regulation of a business coming under the police power. And section 2442 of the original license ordinance, of which the amendment is now a part, provides a fine for any violation of the ordinance, where no other penalty is specifically provided.

To sustain the validity of the ordinance in question we must dispose of certain text and case authority to the con-

trary. In 25 Cyc. 628, par. 4 (II) appears the following statement:

“Time of Payment. Payment of a license-tax cannot be made a condition precedent to the issuing of the license,”

citing in support thereof the cases of

German-American F. Ins. Co. v. City of Minden,
51 Nebr. 870, 71 N. W. 995.

State v. Bennett, 19 Nebr. 191, 26 N. W. 714;

and the accompanying statement as follows:

“nor is payment due for the license before it has been actually taken out,”

citing in support of this, the case of

Santa Cruz v. Santa Cruz R. Co., 56 Cal. 143.

State v. Aitkin, 61 Nebr. 490, 85 N. W. 395.

In the case of *German-American F. Ins. Co. v. City of Minden*, *supra*, the court said:

“We now reach the question of the validity of this particular ordinance. Is it an attempt, and a valid one, to execute the power granted to impose an occupation tax, or is it in effect an attempt to impose a license?
* * * It is quite evident from its terms that its sole object is to obtain revenue. * * * But by a long and unbroken line of decisions this court has held that the payment of such a tax may not be enforced by requiring its payment as a condition precedent to doing business, or by the imposition of a criminal punishment for doing business without payment. (*State v. Bennett*, 19 Nebr. 191; *State v. Wilcox*, 17 Nebr. 219; *State v. Green*, 27 Nebr. 64; *Magneau v. City of Fremont*, 30 Nebr. 843; *Templeton v. City of Tekamah*, 32 Nebr. 542.”

These Nebraska decisions advance no theory, reasoning or authority in support of the proposition adopted therein and we find that all these cases were expressly overruled in subsequent decisions of the Supreme Court of Nebraska.

Rosenbloom v. Nebraska, 64 Nebr. 342, 89 N. W. 1053, 57 L. R. A. 922.

Western Union Telegraph Co. v. City of Franklin (Nebr.), 141 N. W. 819.

In the former of these cases it is said:

“Three cases decided by this court (*State v. Green*, 27 Nebr. 64; *Magneau v. Fremont*, 30 Nebr. 844, and *Templeton v. Tekamah*, 32 Nebr. 542) declare that penal provisions of an occupational tax ordinance are unenforceable. These decisions do not profess to rest in either reason or authority, and are, in our judgment, contrary to both. If they had become a rule of property, we should certainly adhere to them, but, since they have not, we think they should not be regarded as precedents; and they are accordingly overruled.”

In the latter case, *Western Union Tel. Co. v. City of Franklin*, it is said:

“The doctrine of the case relied upon (*German-American Fire Ins. Co. v. City of Minden*, 51 Nebr. 870), and of the cases of *State v. Green*, *Magneau v. City of Fremont*, and *Templeton v. City of Tekamah*, *supra*, upon which the decision of the *Minden* case was based, holding that an occupation tax could not be collected by fine and imprisonment was reconsidered and overruled in *Rosenbloom v. State* (*supra*). * * * This case seems to be in line with the weight of authority.”

In an opinion of the Supreme Court of Utah it is said:

“In *Rosenbloom v. State* (*supra*) the former decisions of the Supreme Court of Nebraska holding to the contrary are overruled. The Supreme Court of Nebraska, in the latter case, brings itself into harmony with the great weight of authority in holding that arrest, fine and imprisonment may be resorted to for the purpose of enforcing payment of license and occupation taxes. The decisions from a large number of the state courts are cited in the latter Nebraska case, and we shall do no more than to refer the reader to that case for the decisions upon this point.”

Salt Lake City v. Christensen Co., 34 Utah 38, 95 Pac. 523, 17 L. R. A. (N. S.) 898.

All the Nebraska cases cited by Cyc. in support of its statement that “payment of a license-tax can not be made a condition precedent to the issuing of the license, nor is payment due for the license before it has been actually taken

out," were at the time of such statement, expressly overruled. Nor does the California citation, *Santa Cruz v. Santa Cruz R. Co.*, 56 Cal. 143, lend any support to this text statement. The principal decision merely holds that the civil action of debt will not lie to recover the fee for a license neither taken out nor applied for, while the opinion on the petition for rehearing disclaims any intention to hold that such civil action may not be authorized by ordinance. The court says:

"There is nothing in the opinion in Department No. 1 which can be construed as indicating a doubt as to the power of the legislature to authorize a city council to provide the mode by which licenses may be collected, or as to the power of a city council, when thus authorized, to provide by ordinance for the collection of license taxes by civil actions brought by the city in a municipal court, or even in another court."

Judge Cooley, in his work on taxation, says:

"A constitutional provision inhibiting imprisonment for debt has no application to the case of a license tax."

Cooley on Taxation, 2d ed. 438; and in the 4th ed. of the same work, Ch. 28, section 1717, it is said:

"Occupation taxes are sometime collectible by suit, as a debt, but payment is sometimes required in advance as a condition to the issuance of a license."

Other decisions sustaining the provisions of the ordinance in question are

Denver City R. Co. v. Denver, 21 Colo. 350, 41 Pac. 826, 29 L. R. A. 608.

St. Louis v. Sternberg, 69 Mo. 289.

Blanchard v. City of Bristol (Va.), 41 S. E. 948.

Davies v. City of Hot Springs, 141 Ark. 521, 217 S. W. 769.

Norris v. City of Lincoln, 93 Nebr. 658, 142 N. W. 114, Ann. Cas. 1914B.

None of the provisions of the ordinance constitutes an invasion of a constitutional guaranty of personal or property rights.

McGhee v. State, 92 Ga. 21, 17 S. E. 276.

Knisely v. Cotteral, 196 Pa. 614, 40 Atl. 861, 50 L. R. A. 86.

The Georgia case just cited holds that such a law or ordinance is not to be held unconstitutional because of the requirement that taxes on certain vocations be paid in advance, and that the persons liable for such taxes shall register their names and places of business before being authorized to pursue such vocations, nor because of a failure to comply with these enactments is made final.

Whatever might be said of the improper enforcement of such an ordinance in a given case, we are convinced that the ordinance in question itself contains no provision that clashes with the constitutional rights of the citizens; and we are therefore of the opinion that the ordinance of July 2, 1923, Council Proceedings, 769, is valid and enforceable.

Respectfully submitted,

FRANCIS J. VURPILLAT,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Right of the City to South Marshfield Avenue from
West 59th Street North to the Right of Way of
the Englewood Connecting Railway;
Also to Certain Alleys.**

September 16, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have your communication of May 20, 1924, requesting an opinion as to the City's rights in the street and alley

mentioned in the caption, which rights have been in question for many years.

On investigation we find that the premises in question are situated in and are a part of a subdivision that was platted and recorded on May 31, 1889, as Document 1108739, in Book 34 of Plats, page 24. On June 4, 1895, an instrument was filed for record, No. 2234396, a copy of which was attached to your communication, purporting to vacate a part of this subdivision as previously recorded. This latter instrument covers the premises described in the caption.

The Statutes, Hurd's Revised Statutes of Illinois of 1899, Chapter 109, Sections 6 and 7, which were effective at the time, require that in order to vacate a subdivision or plat where lots have been sold, all the owners of lots in such subdivision must join in the execution of a deed of vacation. The purported deed of vacation above referred to shows on its face that the owners of Lots 7, 8, 9, 10 and 11 in Block 1 in the aforesaid subdivision did not join in the execution of this instrument of vacation, said lots having previously been sold. It does not, therefore, comply with the Statutes. We consider that this instrument, purporting to vacate a part of this subdivision and affecting the street and alley mentioned in the caption, is, for all intents and purposes of vacation, null and void and of no effect.

We are therefore of the opinion that neither the Heitman Lumber Company nor any other person or corporation has any title to or right of possession to the premises in question. The street and alley belong to the City.

We have viewed the premises and find that no such improvements have been erected on these premises which would justify the assertion of an equitable estoppel against the City on account of its long delay in claiming its own and the consequential erection of improvements by the Heitman Lumber Company, now in occupancy.

In order to clear the street and alley above referred to from obstructions, we beg to call your attention to Sections 3710 and 3711 of The Chicago Municipal Code of 1922.

The said sections set forth in detail what the Commissioner of Public Works should do to remove the obstructions from said street and alley.. In case you are not successful in clearing the premises, kindly refer the matter to this department and we will institute the proper proceedings.

Yours truly,

FRANK T. HUENING,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

(See opinion of February 21, 1925, *post*, on the same subject.)

Claim of City Against U. S. Government Growing Out of Use of Municipal Pier.

September 16, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

In response to your communication of June 28, 1924, to this department, we desire to say that we have examined the files relative to the claim of the *City of Chicago v. The United States of America*, growing out of the leasing of space on the Municipal Pier in 1920. The files that we have examined contain correspondence and copies of the leases from the City to the Government. There are six of these leases lettered "A", "B", "C", "D", "F" and "G", each dated and effective from July 1, 1919, and expiring June 30, 1920.

It appears from the correspondence that the matter having relation to compensation for use and occupation of the premises covered by the leases has been in controversy for

some time and that the former and present superintendents of the Pier have communicated with the Comptroller General of the United States looking toward an adjustment of the claim.

All of the leases provide, amongst other things, for a notice of thirty days to the City by the United States to terminate the leases. A notice of this character was served by the United States on the City on December 30, 1919, by which notice the leases were terminated on January 31, 1920. The service of this notice amounted to an actual termination of the lease on the latter date so that if the City was entitled to any compensation from the Government for the occupancy of the space on the Pier in February, 1920, such compensation would be due not under the terms of the lease but for use and occupation of the space by the United States Government in violation of its obligation to deliver up possession of the space at the expiration of the term of the lease as provided in the lease. The City would therefore have to file a claim for damages for a breach of the terms of the lease on the part of the Government for its failure to restore possession of the premises in the same condition they were in at the time the leases were executed, and also file a claim for damages for the reasonable rental for the use and occupation of the space during the period of time taken to restore the premises to the original condition that they were in prior to the execution of the leases.

The facts in this transaction present a situation wherein the Court of Claims might well say that a duty devolved upon the City after the leases were terminated to take action in restoring the Pier to its original condition if the United States Government failed to do so, and if the City failed in this regard then such failure would be in mitigation of damages which might be sustained by the City by the Government's failure to make restoration. If the City did restore the premises to its original condition, then it could under the terms of the lease recover the amount so expended together with rental for use and occupation during the time it took to make such restoration.

On February 25, 1921, an agreement was entered into between the City and the United States by which the United States agreed to pay the City the sum of \$10,250.00 for and in consideration of which sum the City agreed to restore the Municipal Pier to the same condition that it was in when the Pier was first occupied by the Government, and the City by this agreement released the United States Government, its officers, etc., "of and from any and all claims for damages or restoration arising out of the use or occupation of the Municipal Pier, Chicago, Illinois, by the United States of America, its officers or agents." The sum of \$10,250.00 was paid to the City under this agreement on October 28, 1921.

The question of compensation for use and occupation would present a controverted question of fact involving the consideration of the language of the release contract of February 25, 1921, and the language of the release itself is such that the Court of Claims might construe such language in favor of the Government, thus making such release show absolute accord and satisfaction of all claims for damages which the City might have for use and occupation or for restoration.

Since this matter has been presented to this department for consideration the Government, through its Comptroller General, has forwarded two checks to the City of Chicago, one dated August 15, 1924, for \$3,266.44, and one dated August 18, 1924, for \$2,355.12, in settlement of what the Government claims to be for the actual period of occupation of the space on the Pier in February, 1920. The total amount of these checks is \$5,621.56.

The City in its letter to the Comptroller General on June 25, 1924, reduced the original claim that it had made to the sum of \$8,286.51. This was done after the Government had refused to pay any sum whatsoever in settlement of the claim of the City. It was in response to the letter of June 25, 1924, that the Government forwarded the two checks in settlement amounting to \$5,621.56.

In view of the payments made by the Government and of the fact that the City received compensation to the extent of \$10,250.00 under the release agreement, the acceptance of which sum might preclude the City from making any recovery whatsoever, this department recommend the acceptance of the \$5,621.56 as full settlement of all claims against the Government for use and occupation of the space on the Pier covering the period of February, 1920. We further recommend that the balance of the claim of \$8,286.51 be charged off and cancelled as against the Government.

We believe that any attempt to collect a further amount than the amount offered by the Government would entail considerable litigation with no definite assurance that the City would be successful in the ultimate outcome of such litigation.

We are enclosing herewith the two checks above referred to.

Yours very truly,

FRANK J. CORR,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

Notice of Change of Location by Licensed Auctioneer.

September 17, 1924.

HON. THOMAS P. KEANE, City Collector.

Dear Sir:

You state that an auctioneer's license was issued to I. A. Saly for location at 6341 South Halsted street and that he intends to or has changed his location to 7 North Clark street. You ask whether section 226 of The Chicago Municipal Code

makes it mandatory on you to recognize a notice of change of location and consider such notice sufficient to instruct the City Clerk to note such on the license thereby authorizing the licensee, I. A. Saly, to carry on business as such auctioneer under the license at the new address.

Section 226 provides that if after delivery of license a change of location be made, no business under the license shall be done until a written notice of such change has been given to the City Collector. It further provides that the licensee shall have the right to make but one change in location of the business carried on by such licensee during the license year.

When I. A. Saly presents to you a written notice of his change of location together with the written statement that the change is the only one made during the license year, and you have satisfied yourself of the truth of that statement, you must make the needed changes and permit him to conduct his business at the new location.

Respectfully submitted,

DANIEL V. GALLERY,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Whether One or Two Judges of Municipal Court Must Sign Warrants To Search for Intoxicating Liquor.

September 18, 1924.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

We have your letter of the 15th inst., asking for an opinion from this office whether or not it is required to have two

municipal court judges issue a search warrant for searches in the night time.

The statute has the following references to the subject-matter. Section 50d of "An Act in relation to a municipal court in the City of Chicago" gives authority to such court, in open court only, to grant search warrants valid in the day time or in the night time.

This act having been passed in the year 1907, by implication repeals, in so far as the Municipal Court of Chicago is concerned, the necessity of having two judges sign search warrants for night time service as required under Section 4 of Division VIII (Search Warrants—search) of the Criminal Code, which was enacted prior to the adoption of the act creating the Municipal Court of Chicago. Personal property having been stolen, embezzled or fraudulently obtained by false tokens or pretenses, as well as counterfeit money, obscene books, lottery tickets and gaming implements are included in this division.

In the year 1921 there was passed by the Legislature of our state the Search and Seizure Act relating to intoxicating liquors and under Section 17 of said act in Chapter 43 (Dram Shops) it is specifically set out that the signature of one judge for day time use is all that is necessary whereas, during the night time, two judges' signatures are required, provided, however, no warrant shall be issued to search a private dwelling occupied as such unless such warrant is signed by two judges, and unless such residence is a place of public resort, or intoxicating liquor is sold or kept for sale in violation of the law.

Therefore, where intoxicating liquors only is concerned, the Search and Seizure Act nullifies the Municipal Court Act requiring the signature of only one of its judges to warrants of that particular class.

Summarizing the foregoing, we restate briefly:

One municipal court judge's signature validates a search warrant in the day time or night time affecting personal property, excepting intoxicating liquors, in which case where a

private dwelling is involved, two judges' signatures are required in the day time or night time, and in places other than a private dwelling, one judge must affix his signature to a search warrant for day time service and two judges for night time service.

Very truly yours,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Proposed Qualifications to Forms Entitled "Instructions to Bidders."

September 20, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We beg leave to acknowledge receipt of your communication of the 2d inst., making inquiry with regard to the propriety of the use of certain "qualification" clauses used by your department on forms entitled "Instructions to Bidders" affecting the following classes of proposals, to wit:

- (1) Commodity contracts where the exact nature of the material bid on is specified.
- (2) Contracts for mechanical equipment where the competition is one of design as well as price.
- (3) Contracts for structures designed completely by the City.

We shall consider each class separately, and say as to Class (1), that where materials are specifically described in specifications which have definite descriptive qualities, we find no good reason why the appendages mentioned, such as

“(e) ‘and to award the contract to a bidder other than the bidder submitting the lowest price proposal, as may, in his opinion, be for the best interests of the City.’”

should be made a part of the forms. It is certain to be a detrimental factor in the minds of prospective bidders to be given notice beforehand that even where there could be no possible difference in the quality of the commodity advertised for they were to be restricted to some unknown contingency. The limitation contained in The Chicago Municipal Code of 1922 under Section 3262 reading “contracts shall be let by the Commissioner of Public Works to the lowest reliable and responsible bidder” is of sufficient latitude to withhold the awarding of any contract upon any reasonable justification and would have the same effect as clause “(e)” hereinbefore set forth as an example.

There is the additional protection to the City in the right reserved to the Commissioner of Public Works to reject any or all proposals.

It is certain to be regarded as an unfair advantage to bidders, in the case of certain described materials, for them to submit their bids, all other things excepting price being equal, only to receive rejection by the head of the department upon the assertion that it is for the “best interests of the City.” Under such arbitrary action it would be possible to render nugatory the important element of competition. Bidders should receive the guarantee that their respective bids will be respectfully considered and where as in Class (1) the commodity is specific in its nature, that the best interests of the City will be served only upon the award of the contract to the lowest bidder, he being, of course, reliable and responsible. To do otherwise would lead to lack of confidence for city business and tend to stifle public competition.

We assume a different position, however, when we consider contracts for mechanical equipment described as Class (2). Any of the qualification clauses listed may well serve

as notice to the bidder that where there might be several grades of mechanical equipment designed for a particular purpose, that the price (provided it is within the City's estimate) could and should be disregarded as the moving element of choice between bidders where it is evident to the Commissioner that the merit of a particular design and make relatively outweighs the lower cost of a competing design. A certain latitude should be left with the head of the department wherever proposals of Class (2) are involved.

Class (3) contracts by analogous reasoning should be considered in the same manner as Class (1) for it resolves itself into a contract for material of certain specifications, assembled in accordance with the City's design.

We cannot find that this question has ever been determined by our courts, yet it may be one that we may not be able to justify if we are faced with it.

Very truly yours,

JAY A. SCHILLER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Power of Health Department To Prevent Pollution of
Water in Harbor Caused by Dumping of Waste
by Park Boards Under Federal Permits.**

September 21, 1924.

HON. HERMAN N. BUNDESEN, Commissioner of Health.

Dear Sir:

We are in receipt of your communication of recent date relative to the right of interference your department would have in the matter of preventing pollution of water in the

City's harbor caused by the dumping of waste by State Park Commissions under authorization of Federal permits.

It is apparent that you withheld taking any action upon the theory that the water touching our shore line being under Federal control and supervision, the local authorities are without jurisdictional power to intervene. This would be true were the question one affecting the regulation of commerce, but where the health, life and safety of the citizens of a State are concerned then the State, through its constituted authorities, may act. *Sherlock v. Alling*, 93 U. S. 99, 104.

The Park Boards are, by virtue of our statutes, corporate bodies, made existent for the purpose of locating, establishing, inclosing, improving or maintaining any public park, and except for the variance of vested powers, theirs, and the City's creation are of equal dignity and have parallel authority, in the functioning of powers of the respective Park Boards and the City.

Since the Boards are limited to certain definite powers, which are not in conflict with the City's charter, it is not to be conceded that the possession of a Federal permit to do a particular thing, would by that general privilege make them immune from the jurisdictional scope of the city health department charged with protecting the health of the citizens. The City can undoubtedly treat the Park Boards in the same light as any private corporation having Federal permission to engage in any improvement.

Section 1734 of The Chicago Municipal Code of 1922 makes it a penalty to befoul public waters:

“Befouling public waters—dredging—penalty.) No person, firm or corporation shall throw, discharge, dump or deposit, or cause, suffer or procure, to be thrown, discharged, dumped or deposited, in the harbor of the city or anywhere in Lake Michigan within ten miles of the corporate limits, any clay, earth, ashes, or other heavy substance or substances, filth, logs or floating matter, or any obstructions, or any refuse matter of any kind or description whatever, unless said material shall be placed inside of a breakwater so arranged as not to permit the escape of such clay, earth, ashes or other

heavy substance or substances, filth, logs or floating matter, or obstructions, or refuse matter into the body of Lake Michigan. * * *"

In *Escanaba Company v. Chicago*, 107 U. S. 678, the Supreme Court of the United States considered the validity of the ordinance which closed the Chicago River to traffic during certain hours of the day and notwithstanding the claims made that it seriously interfered with navigation, the court sustained the ordinance.

In *Sherlock v. Alling*, *supra*, the court said:

"The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the State to which the vessels belong; and it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."

This doctrine has been adopted in later decisions.

The Supreme Court of Illinois, this year, upheld the Corporation Counsel in the case of *The County of Cook v. City of Chicago*, 311 Ill. 234, indicating therein that under the police power inherent in cities and villages, they may enact reasonable ordinances to preserve the health and safety of the community even where it affects territory beyond the corporate limits of such municipality, and on page 238 of said opinion said:

"In *Chicago Packing Co. v. City of Chicago*, 88 Ill. 221, where an ordinance by the City of Chicago prohibiting slaughter houses within one mile of the city limits was attacked on the ground that it was not within the police power of the city, this court upheld the ordinance on the ground that to protect the health and lives of a large number of people living in one community the State had power to confer, and has conferred, on cities and villages the right to regulate such instrumentali-

ties as slaughter houses, *even though the territory over which the jurisdiction of the ordinance extended embraced other municipalities.*”

And further in the same opinion, on page 247, said the following:

“Did they (the legislature) intend that the city should be annoyed and injured in health and comfort by the exercise of the power of a corporation with a comparatively sparse population and to submit to have imposed on them such nuisances as the town of Lake might impose by licensing them? We cannot suppose the General Assembly so disregardful of the health and comfort of such great numbers of people, but, on the contrary, we must suppose it was intended that the people of Chicago, and other cities under like circumstances, should have the means of protecting themselves against such intolerable wrongs as might thus be inflicted upon them. We must conclude that the General Assembly, rather than subject our large cities to such hazards from smaller municipalities in their immediate vicinity, would have repealed the charters of the latter or at least have curtailed their powers.”

We are of the opinion, therefore, that the State, and under it, the City, has not been divested of the right to legislate on health matters merely because the United States Government issued a permit to others to dump refuse into its navigable waters. Your department is therefore not precluded from guarding against pollutions and from doing all things necessary in fulfillment thereof.

Very truly yours,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Power of City to Borrow Up to Five Per Cent of the Full Value of Property Within the City.

September 22, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir :

Your letter to the Corporation Counsel, asking for an opinion upon the question raised by Mr. John Gibson Hale, viz.: that the City has authority to borrow up to five per cent of the full value of the property within the City, has been referred to me, and I beg to reply thereto as follows:

Section 34 of Article IV of the Constitution cited by Mr. Hale is an amendment dealing with the municipal government of the City of Chicago. The consolidation of municipal corporations lying within said City authorized by this amendment has not been carried into effect by the adoption of legislation therefor by the people. The act of the Legislature of 1915 passed for this purpose was rejected by the voters (Chapter 24, p. 245, Smith-Hurd's Illinois Statutes). Therefore the provisions as to taxation and indebtedness are not in effect, and Section 12 of Article IX remains unrepealed.

In the event that the amendment shall be given effect by the adoption of future legislation, what construction may be given to the word "full" appearing in the amendment upon which Mr. Hale bases his contention that the limitation of indebtedness of the City is five per cent of the *full* value without reference to the *assessed* value, may be doubtful. The language with the exception of the word "full" is the same as that of Section 12 of Article IX—that the taxes shall not exceed 5 per cent of the value as "ascertained by the last assessment."

The rule early adopted in this State and continuously upheld by the Supreme Court is that the "assessed value is the part of the actual or full value upon which taxes are to be apportioned."

In the case of the *City of Chicago et al. v. Fishburn*, 189 Ill. 367, the court held:

"The limit upon municipal indebtedness, imposed by the constitution and repeated in the City and Village Act, prohibits the incurring of an indebtedness beyond five per cent of the "assessed value" of taxable property therein, notwithstanding the provision of the Revenue Act of 1898 requiring the assessor to enter in his books both the full value and the assessed value."

In the opinion of the court it is said:

* * * "The meaning of the term 'assessment' in connection with taxation, is well understood. It is an official valuation of property for the purpose of fixing the proportion of taxes which each one shall pay. Judge Cooley, in his work on the Law of Taxation (p. 258) defines it as follows: 'An assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district. As the word is more commonly employed, an assessment consists of the two processes of *listing* the persons, property, etc., to be taxed, and of *estimating* the sums which are to be the guide in an apportionment of the tax between them.' By our constitution the assessment is a valuation to be determined according to the discretion of persons elected or appointed in such manner as the General Assembly shall direct. It does not provide for a fixed or arbitrary standard of value, *and we have constantly held that the valuation for the purpose of taxation is committed to the discretion of the assessor. It must be determined by him and cannot be fixed by the legislature*, which, however, are required by the constitution to enforce the provision that every person or corporation shall pay a tax *in proportion to the value* of his, her or its property. The intent of the people was that revenue should be provided by levying a tax according to valuation, to be ascertained by some person or persons elected or appointed for that purpose, so that there should be uniformity and equality between the owners of property and the different subjects of taxation. The statute in force when the constitution was adopted required an assessment of property at its *actual* value, and the statute continued to so require up to the

act of 1898, which is now in force; but it was common knowledge that under such statutes property was not assessed at its full value. In *Bureau County v. Chicago, Burlington and Quincy Railroad Co.*, 44 Ill. 229, and *Chicago and Northwestern Railway Co. v. Boone County*, *id.* 240, this court took notice of that practice as being long uniform, unchallenged, and recognized by the authorities having special charge of the revenue of the State. * * * Under previous constitutions the rule adopted by assessors to take some share of the real value of property as its value for taxation had grown into a custom sanctioned by every department of the government and recognized by this court, and, unquestionably, the provision in question referred to the value so fixed for the purposes of taxation."

The *Fishburn* case is cited and followed in the *People v. Board of Review*, 290 Ill. 467, the court saying as follows:

"The constitution sets a limit upon the indebtedness which may be incurred by a municipal corporation to five per cent of the value of the taxable property therein to be ascertained by the last assessment for State and County taxes previous to the incurring of such indebtedness. The limit of five per cent must be based on the assessed value for the purposes of taxation. (*City of Chicago v. Fishburn*, 189 Ill. 367), and the General Assembly from time to time has fixed a basis of one-fifth, one-third or one-half of actual value as assessed value. The assessed value is a merely arbitrary portion of the value of property assessed, in connection with the rates authorized to be levied by taxing bodies, for the purpose of producing what the General Assembly may deem a sufficient revenue."

People v. Illinois Central Railroad Co., 273 Ill. 220.

People v. The Chicago, Burlington and Quincy Railroad Co., 300 Ill. 399.

The Illinois Central Railroad Co. v. Emmerson, Secretary of State et al., 299 Ill. 228.

Willis v. Clark, 221 Ill. App. 614.

It is possible that Mr. Hale has overlooked the fact that the amendment is not in effect.

Since the adoption of Sec. 34 of Article IV, the City's borrowing power has in fact been increased by amendment of Section 2 of the act concerning the levy and extension of taxes by raising the assessed value of the property to one-half of the full value thereof. (Ch. 120, Par. 130, Section 2, Smith-Hurd Ill. Rev. Stat. 1923.)

It is therefore our opinion that the City's constitutional indebtedness is limited to five per cent of one-half of the full value of the taxable property.

Respectfully,

CORA B. HIRTZEL,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Provisions of Zoning Ordinance as to Building Line After Street Has Been Widened.

September 23, 1924.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge the receipt of your letter of September 19th, requesting the views of this department as to your action in the matter of building lines, under the provisions of the Zoning Ordinance on North Ashland avenue and other streets which are widened by authority of the city.

The question you present is a new one and we can find no adjudicated cases which would be helpful to us in the solution of it. So that such views as are herein expressed are based upon what we believe to be general legal principles applicable to the situation.

By the provisions of the Zoning Law a building line was automatically established, the said building line depending on whether the block was vacant or not, upon the use district in which the block was placed, and upon the present distances back, or lack of distances back, of the street line of the buildings in a block.

In paragraph three of your letter you state:

“* * * after the establishment of the new street line it is found that a number of buildings do not encroach upon ground to be occupied for street purposes, but are not in conformity with the requirements of the Zoning Ordinances with reference to the building line of the widened street, although they were in conformity with the Zoning law with reference to the original street line. We have been advised that no damages have been awarded where it was not necessary to move the building to make way for the street widening. * * *”

In the situation above suggested by you manifestly the buildings will have to be permitted to remain where they are as there is no provision that we know of by which we could compel the property owners whose buildings conformed to the provisions of the Zoning Ordinance under the old street line to move back buildings to make them conform to a building line under the new street line as established by the city.

In case of buildings now existing and which must be moved back or have a portion of the front of them cut off so as not to encroach beyond the new street line, it must be kept in mind that until the street was widened such buildings were existing in compliance with the building line provisions of the Zoning Ordinance, or had been erected before the enactment of the Zoning Ordinance.

In cases where a portion is to be cut off of a building so that the building will be inside of the new street line, the only requirement that you can make in our judgment is that the building when cut off will be inside of the new street line.

In cases where entire buildings are to be moved back to make way for the widening of the street you can not re-

quire the said building to be moved back further than the new street line as established by the city ordinances, where there are buildings in the block which have been cut off and whose front street walls are at the street line unless the average distances back of existing buildings exceed ten feet from the new street line, and buildings which have been cut off should be regarded as existing buildings.

What we have said above applied only to existing buildings which must be cut off or moved back to make way for the widened street.

Where buildings are to be hereafter erected, the various sections of the Zoning Ordinance as to building lines will govern the situation, the said building lines to be based upon the new street line of the widened street.

In cases where blocks are now vacant, the new building line should be established at 15 per cent of the average depth of the lots in the block in a residence district, and 10 per cent of the average depth of the lots in the block in an apartment district.

Yours very truly,

WM. L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Wage Scale of Temporarily Appointed Employes.

Chicago, September 26, 1924.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

Your letter concerning the salaries to be paid to certain temporary employes in your department was referred to the undersigned for consideration and reply.

It appears from your letter that there are two men employed as Building Inspectors in Charge under temporary appointment, that the Annual Appropriation Bill fixes the salaries for such positions at \$2,700 per annum, but that such amount is greater than the minimum salary for the rank and grade of this position when a regular civil service appointee first takes the place. The same situation obtains with respect to a Junior Clerk, where the maximum salary of \$1,800 was provided for by the Appropriation Bill.

You state that these parties have special qualifications for the positions they hold, and that it is your desire to pay them the amounts specified in the budget, but that the Civil Service Commission advised you that it will only pass pay-rolls providing for the minimum wage scales for such positions. You state further, that in the past, opinions have been given to the effect that the salaries named in the Annual Appropriation Bill must be paid. Your question is whether this is not the rule to be followed in the present instance.

The opinions to which you refer were given before the following ordinance was in effect:

"2827. Appointment must be to lowest salary group—advancement.) Whenever any grade or rank in the classified service of the city shall have been divided into salary groups, for the purpose of varying compensation according to efficiency and seniority and the city council shall have appropriated according to such salary groups for the positions in the said grades of service, appointment by the head of the department or by the appointing officer shall be to the group having the lowest fixed salary rate. Advancement to the higher groups of salary rates shall be made on the basis of efficiency and seniority within the department, as shown by the records thereof kept in the office of the Civil Service Commission."

On July 26, 1919, an opinion was rendered in this department holding that salaries must be paid in accordance with the amounts fixed therefor in the Annual Appropriation Bill, notwithstanding the passage of an order subsequently to the effect that appointments (including tempo-

rary appointments) shall be to the group having the lowest fixed salary group. The principal reasons given for this ruling aside from questions as to whether the order was signed at the time, were that it could not operate to overcome the provisions of an ordinance, and the wording was such that it did not affect employes who had been previously appointed. In that opinion, however, it was said with respect to the provisions contained in the order that was under consideration:

“In order to make such provisions valid they must either be incorporated in the appropriation bill or they must be adopted by a general ordinance that is effective at the time the appropriation bill is passed. In the latter event the appropriation bill will be construed with the general ordinance and effect will be given to both if possible.”

What we pointed out as the method by which such a provision as the one in question can be made effective has been followed since. The City Council has adopted Section 2827 which we quoted above as a part of the Code. It was in effect at the time the Appropriation Ordinance for 1924 was passed, and it must be construed so as to give it effect unless there is some provision of the latter ordinance so directly in conflict with it that it amounts to a repeal of the former ordinance by implication. This is not the case here.

In the face of the law which gives the City Council complete control over the finances of the City and authorizes it to fix the salaries of all officers and employes, we could not hold that the City Council is unable to establish a rule which requires a new appointee or a temporary appointee to take a position at the minimum salary fixed therefor. The only question is whether it has done so by a proper and effective legislative act. This was the only question that could be raised at any time, and it was because there was in each case a faulty method used that the opinions of which you speak were rendered.

There is no doubt of the validity of Section 2827, which governs the whole subject matter of appointments to the lowest salary group and permits the application of the rule even

though the appropriation made for the position was not the minimum for such place. By the ordinance of June 18, 1924 (Council Journal, p. 3342), the rule became applicable to temporary employes, although they were permitted to retain payments previously made.

Whether an employe who has actually held the position by temporary appointment and who is then newly appointed thereto as a result of a promotional examination is entitled to credit for the time he has so served and to immediate advancement to a higher salary group by reason of efficiency and seniority, is a different question. We would not say that the rule of appointment to the lowest salary group is so inflexible that it could not be controlled in such a case by council action.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Whether Double House Separated by Party Wall May Be Erected on Premises Zoned for Residences.

September 27, 1924.

MR. H. T. FROST, Secretary, Board of Appeals.

Dear Sir:

This will acknowledge the receipt of your letter of September 24th, asking the advice of this department whether a certain proposed improvement may be lawfully constructed in a Residence District under the provisions of the Zoning Ordinance.

From your communication and the files in the case, we take it, the facts are briefly as follows: that at the northeast corner of Wilson avenue and the Sanitary Canal on two adjoining vacant lots the owners thereof desire to improve the property to house their two families; that the premises of one family will be separated from the premises of the other by a party wall running from the ground to the roof; that the party wall is to be 12 inches thick and one-half of it is to be on each lot, the center of the party wall being the dividing line between the two lots; that there are to be no communicating openings of any kind in the party wall; that the services for each family including the heating apparatuses, entrances, stairways, etc., are to be entirely separate.

By the Zoning Ordinance the lots in question have been placed in a residence district. Certain uses only are permitted in a residence district, but the single one that would be applicable at all to the instant case is the following:

Section 4, Paragraph B, R1 Use. An R1 Use shall include every use as a dwelling house.

If the proposed structure falls in that category, it may follow that it may be lawfully erected in a residence district, there being no contention made, as we understand it, that the proposed improvement does not conform to the volume, area, and building line provisions of the Zoning Ordinance.

The Zoning Ordinance defines a dwelling house as follows:

“Sec. 2. (h). Dwelling House—A building used or intended to be used as a home or residence in which all living rooms are accessible to each other from within the building and in which such living rooms are accessible without using an entrance, vestibule, stairway or hallway that is designed as a common entrance vestibule or common stairway or common hallway for more than one family, and in which the use and management of all sleeping quarters, all appliances for cooking, ventilating, heating, or lighting, other than a public or community service, are under one control.”

So far as we are advised the proposed premises separated by the party wall are intended to be used as homes for two

separate families. In each home all living rooms are accessible to each other from within the building without using an entrance, vestibule, stairway or hallway that is designed as a common entrance, vestibule or common stairway or common hallway; and in each home the use and management of all sleeping quarters, all appliances for cooking, ventilating, heating or lighting, other than a public or community service, are under one control.

What is it then that is responsible for the objections to the proposed improvement? It must be that the neighbors object because the owners of these two lots desire to utilize a party wall in the separation of their premises. But is there any reasonable basis founded in law for the objection?

No one, we venture, will seriously question the fact that on these two lots the owners thereof could within the law construct their homes on the said two lots in such a manner that the adjoining side walls of one building would be snug up against the other. That being the case, if it is desired to use a 12-inch party wall to separate the premises, for the purposes of economy or otherwise, instead of two separate walls, and there is nothing in the Zoning Ordinance or the Building Code prohibiting such party walls, we can perceive no legal basis for the objection of the neighbors. Nothing in the Zoning Ordinance requires that residences be separated from each other by space.

It may be contended that because of the party wall feature, the proposed improvement will be an apartment house. It does not seem to us it could be so classified. There are certain distinguishing characteristics about an apartment house. An apartment house as a matter of common knowledge always suggests common stairways, vestibules, entrances and hallways. It further suggests common heating plants, etc.

In sustaining an ordinance to keep apartment buildings out of residence districts, one of the main reasons given in a leading case upon the subject was the matter of the use of a common hallway, and common front and rear stairways. The court in that case said:

"The danger of the spread of infectious diseases is undoubtedly increased, however little, where a number of families use a common hallway and common front and rear stairways." *State ex rel. Morris v. Osborn*, Court of Common Pleas, County of Cuyahoga, Ohio, April 30, 1920.

But in the case before us, we have no common stairways or hallways. The entrances are absolutely separate and distinct. Likewise the heating plants and other services are separate.

The lots on which the separate homes are to be constructed are even owned by different people and can be separately sold at the will of the owners.

In our judgment, by no fair reasoning can the proposed improvement be designated an apartment house, but on the other hand consists of two distinct dwelling houses, separated by a party wall.

It is probably true that the residents in the block, in which the aforementioned lots are situated, would prefer to have each of the proposed homes situated in the center of its lot surrounded by open spaces or yards, and with no party wall between them, to conform to the surrounding residences, but the zoning law makes no such requirements and such considerations would be purely aesthetic and must give way to the rights of the property owners on these lots to make improvements as they see fit so long as there is no prohibition in the law against it.

But it may be suggested that it was the intent of the Zoning Ordinance to prohibit it. Was it? We must get the intent from the words of the ordinance itself, adding nothing to them, subtracting nothing from them. What line of the Zoning Ordinance can be pointed out as prohibiting it? None.

If there were any doubt, in the instant case, which there is not, it would have to be resolved against the restriction and in favor of the owner of the property. Statutes and ordinances in derogation of property rights are strictly construed. *Schields v. Ross*, 158 Ill. 214.

At common law restrictions upon the use of property, such as those contained in the Zoning Ordinance, were unknown and statutes and ordinances derogatory of common law must be strictly construed and statute or ordinance will not be construed as changing the law further than the terms of the statute or ordinance expressly declare. *The Canadian Bank of Commerce v. McCrea*, 106 Ill. 281.

Is there any express provision in the Zoning Ordinance against the construction of the proposed improvement in a residence district? We can find none.

There is nothing that we can see in the construction of the proposed improvement that could even be remotely regarded as violating any of the use provisions of the Zoning Ordinances.

It follows, therefore, that in our view the proposed structure in a residence district conforms to the use provisions of the Zoning Ordinance.

Yours very truly,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Use of Funds for South Water Street Improvement—
Borrowing Money in Anticipation of Bond
Issue Authorized But Not Yet Issued.**

September 29, 1924.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

You ask to be advised whether it is possible to comply with the request of the President of the Board of Local Im-

provements in respect to the use of funds available for the South Water Street Improvement. This would involve the expenditure of funds drawn from the original bond issue in excess of the amounts heretofore appropriated and expenditures from the new bonds about to be issued.

The Annual Appropriation Bill sets aside the sum of \$2,721,059.02 (Council Journal, p. 2325) for this improvement. In conformity with rulings previously made in this department, we would say that the whole of this can be made available, through appropriate Council action, for such purposes in connection with the improvement as may be necessary. This does not mean that the money may be used contrary to the manner specified in the appropriations by the approval of the Committee on Finance or its Chairman. If it is the desire to anticipate the action of the City Council in this way, and the money is paid by the Comptroller and Treasurer, on such approval, there would have to be proper orders and ordinances passed later. Up to the time that such action was had by the Council the officers who paid out the money would be responsible therefor.

There were a large number of specific appropriations from the bond fund. Vouchers against them would of course be honored. There was also an appropriation for \$2,067,218.02 "for other expense in connection with this improvement" which was to be expended only after further order of the City Council. Of this amount the Council released \$1,200,000.00 for the payment of judgments (Council Journal, p. 3542). Vouchers for the payment of judgments can be drawn against this at any time.

If it is desirable to use in excess of the \$1,200,000.00 out of the \$2,067,218.02 appropriation, in order to do it strictly according to law it will be necessary for the Council to release the balance or such portion as may be required. If the money is used before this is done in anticipation of such action whatever risk it attached thereto is on the officers who use it in this way. The Council may also, if it sees fit, make

transfers from other appropriations so that the whole of the balance left in the total of \$2,721,059.02 may be used.

If from the proceeds of the bonds there has been yielded money in addition to this which has not been appropriated, it is possible that the City Council has authority to appropriate it now. There is a theory to the effect that the passage of the ordinance authorizing the issuance of bonds and the approval of same when the ordinance is submitted to the voters in itself constitutes an appropriation, so that the City Council may at any time direct the use of the money desired from the bonds. There is nothing in the case of *People v. Sergel*, 269 Ill. 619, which directly negatives this theory. But we have always advised against putting this theory to the test on account of certain language used by the Supreme Court in that case, which might perhaps be successfully invoked for the purpose of blocking the use of the money at least for a time. While the file of correspondence before us indicates that there is some such money on hand, there is probably not enough to warrant a departure from the practice that we have been following in this respect.

The only question left, therefore, is what can be done about using some money in anticipation of the issuance of the new bonds.

There is no provision of the statute which could be construed as authorizing the anticipation of such revenue in a manner similar to the way money may be raised in anticipation of the collection of taxes. If any one advanced any money for such bonds "as, when and if issued" it would be quite an unusual thing. The bonds may be printed and advertised for sale before January 2, 1925, and the award may even be made before that time, but they could not be delivered until that date. An advancement would be at the risk of the party loaning the money.

If such advancement were made it would still be necessary for the City Council to take action along the lines we indicated above, on the theory that it has the right to appropriate from a bond fund at any time. Whether this is ad-

visible, in view of the fact that the new bonds will be available in about three months, is a matter for the City Council to determine.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Civil Service Status of Deputy Superintendent of
Streets as Created by Amendatory Ordinance
—Who Entitled to Take Promotional
Examination for Same.**

September 30, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

HON. THOS. H. BYRNE, Superintendent of Streets.

Gentlemen:

We have given careful study to the ordinance of July 15, 1924 (Council Proceedings, p. 3680), amending Article V, Bureau of Streets, Sections 3234 to 3240 of The Chicago Municipal Code of 1922, particularly with reference to the civil service status of the present assistant superintendents of streets in relation to the new office of Deputy Superintendent of Streets and the positions of the three Assistant Superintendents of Streets, as defined in the amendatory ordinance, and we are hereby presenting our opinion in the matters about which you recently made inquiry.

Preliminary to the consideration of the specific questions presented, we must refer to some general provisions of the City Civil Service Act which have application to cases of this character. Section 3 of the Act (Ch. 24½, Sec. 41, p.

441, Smith-Hurd Ill. R. S. 1923) provides that the City Civil Service Commissioners

“shall classify all the offices and places of employment in such city with reference to the examinations herein-after provided for, except those offices and places mentioned in section eleven of the Act. The offices and places as classified by the commission shall constitute the classified civil service of such city; *and no appointments to any such offices and places shall be made except under and according to the rules hereinafter mentioned.*”

Section eleven of the Act provides that only such

“Officers who are elected by the people, or who are elected by the city council pursuant to the city charter, or whose appointment is subject to confirmation by the city council, judges and clerks of election, members of any Board of Education, the superintendent and teachers of schools, heads of any principal department of the city, members of the law department, and one private secretary of the mayor, shall not be included in such classified service.”

A careful comparison of the ordinance of July 15, 1924, and that comprising Sections 3234 to 3240 of The Chicago Municipal Code of 1922 shows that but one new office has been created by the City Council in its declared purpose of reorganizing the Bureau of Streets, namely: the office of Deputy Superintendent of Streets. This office does not come within the declared exceptions of Section 11, *supra*, of the Civil Service Act, and can, therefore, be filled only in substantial compliance with that act. The specific language of the Supreme Court in this connection may well be quoted here:

“The foundation principles of the act are, that appointments to municipal offices or employments must be made according to merit and fitness, to be ascertained by competitive examinations, free to all; and that promotions from lower to higher grades in the public service must be made upon the basis of merit.”

The People, ex rel. v. Kipley, 171 Ill. 44.

In addition to the new position of Deputy Superintendent of Streets the reorganized Bureau is to embrace “three As-

sistant Superintendent of Streets," all to be engaged in the same general line of work, but each to have charge of a section of the city to which he may be assigned, instead of the First Assistant, Second Assistant and Third Assistant Superintendents of Streets, who, as provided by the original ordinance, were engaged in defined parts of the general work throughout the entire city.

The particular questions now arise: (1) What is the civil service status of each of the assistants, First, Second and Third, under the original ordinance in relation to the positions now denominated the "three Assistant Superintendents of Streets?" (2) Are these First, Second and Third Assistants eligible and entitled to the three positions denominated Assistant Superintendents of Streets, without civil service examinations? (3) What legal right or claim to priority, if any, has the present First Assistant Superintendent of Streets or the Second and Third Assistant Superintendents to the new office of Deputy Superintendent of Streets? and (4) Are any of the Assistant Superintendents under the old ordinance eligible to the new office without civil service examination?

The office of Deputy Superintendent of Streets and the positions of Assistant Superintendents of Streets, those named in the original ordinance as well as those designated in the amendatory ordinance, are embraced in the same general and special classification made by the City Civil Service Commission under Rule 1 of the Civil Service Rules, in force June 1, 1920. They fall within the general classification of "*Branch II Operation and Construction*," and the following special classification thereunder:

"Class H. Street, Water, Sewer and Waste Disposal Service embracing positions the duties of which involve the paving, repairing and cleaning of streets, the laying and repairing of sidewalks, the maintenance and extension of sewer and water systems, the collection and disposal of waste and garbage, and the operation of dumps, loading stations and reduction works."

It appears that the "three Assistant Superintendents of Streets" are required by the ordinance of July 15, 1924, to

engage in the same character and line of work as were the First Assistant, Second Assistant and Third Assistant Superintendents under the original ordinance. The declared purpose of the City Council in the passage of the amendatory ordinance was merely to reorganize the Bureau of Streets, and no change whatever is made in the jurisdiction, scope and character of the operations of the Bureau of Streets as reorganized, and the only difference in the work of the Assistant Superintendents of Streets is that, instead of doing part of the general work as each was required to do throughout the entire city, each assistant is given charge of all the work throughout that part of the city to which he may be assigned. This does not constitute new work, or a promotional work of higher grade or rank, so as to warrant the construction of the ordinance in question as one intended to abolish the positions of First, Second and Third Assistants and create instead "three Assistant Superintendents of Streets." The fact that the council designates "three Assistants" in the plan of reorganization where three existed under the original ordinance is of itself evidence that the council contemplated no substantial change in the character of the positions of Assistant Superintendents. And the fact that the council struck out and repealed Sections 3238, 3239 and 3240, thereby discontinuing the Assistants as First, Second and Third, and adopted in lieu thereof the amended Section 3238, which provides for the "the Assistant Superintendents," plainly indicates the council's intention to rename and reassign the present Assistant Superintendents to carry out the purpose of reorganizing the Bureau of Streets. The other construction, that the council's purpose was to discontinue the existing assistants to make possible the selection in their stead of other persons as Assistant Superintendents, would make the amendatory ordinance of the council illegal, a result forbidden by the established canons of construction when another construction would sustain the act or ordinance as legal.

"While the city has the right to actually and in good faith discontinue any position when the same be-

comes no longer necessary or useful, yet neither it nor the commission had any right to continue the position in force and to remove appellee until charges had been preferred against him and sustained by the commission in the manner provided by Section 12 of the Civil Service Law. (*City of Chicago v. Luthardt*, 191 Ill. 516.) Neither the City nor the commission, nor both combined, can legally abolish a position temporarily for the unlawful purpose of later re-establishing it and installing therein another person as employe. To permit such a course of conduct by the judgment of this court would be, in effect, to declare the Civil Service Law a dead letter, a law enforceable only at the discretion of said city officers whose duty, under the law, is to enforce it, or assist in enforcing it, according to its terms."

The People, ex rel. v. Coffin, 283 Ill. 599, 610.

Even if it were possible to construe the reorganization ordinance as creating new positions, or positions of higher grade and rank than those of First, Second and Third Assistant Superintendents of Streets, these old assistants would be entitled, exclusively, as comprising all the persons eligible under Section 2 of Rule V for promotion, to take the examinations for such positions.

The People, ex rel. v. Errant, 229 Ill. 56.

But as we have seen, the positions of the "three Assistant Superintendents of Streets" were intended to be and practically are the same under the ordinance of July 15, 1924, for the reorganization of the Bureau of Streets, as Assistant Superintendents of Streets, designated as First, Second and Third under the original ordinance; and, since their work is practically the same and they are already qualified therefor under previous civil service examinations, their present legal and civil service status entitles them to hold the positions designated by the amendatory ordinance as "three Assistant Superintendents of Streets" without further examination, each to have charge "of a section of the city to which he shall be assigned."

There is no such relationship existing between the position of First Assistant Superintendent of Streets under the

old ordinance and the office of Deputy Superintendent of Streets embraced in the reorganized Bureau of Streets as entitles the First Assistant to priority of claim and right to the new office. And the same must be said of the position of Second and Third Assistants. All the old assistants are on an absolute legal equality of status and eligibility to the new office of Deputy Superintendent of Streets.

The office of Deputy Superintendent was created without any reference to the position of First Assistant, or to the positions of the other assistants. And the First Assistant's position might have remained in the reorganized Bureau of Streets without the slightest conflict or inconsistency, as might also the other positions. Section 3238 of The Chicago Municipal Code of 1922, creating the position of First Assistant and defining its work, was not amended or repealed to make way for the creation of the office of Deputy Superintendent of Streets, but was stricken out, just as Sections 3239 and 3240, similarly creating the positions of Second and Third Assistants and defining their duties, were repealed, for the express purpose of reapportioning the work of the "three Assistant Superintendents of Streets" and assigning each to a separate section of the city. It too clearly appears, as already pointed out, that the Council's intention in passing the amendatory ordinance was to make the existing First, Second and Third Assistant Superintendents the "three Assistant Superintendents" in the proposed reorganized Bureau of Streets, to lend any support to the contention that the new office of Deputy Superintendent was created with any view to its being filled by any of the present Assistant Superintendents under their existing civil service status. There is as much difference between the position of First Assistant Superintendent of Streets and the new office of Deputy Superintendent of Streets as there is between Sections 3236 and 3238 of the original ordinance. Section 3236 prescribes *for the Superintendent of Streets* his second line of duty. Section 3238 defines the *duties of the First Assistant*. Section 3236 was stricken out and the amended Section 3236 passed, thereby assigning the second line of the Superintendent's duty *to the*

Deputy Superintendent whose office was created for the purpose. Section 3238 was stricken out and Sections 3239 and 3240 repealed and the new Section 3238 was passed to provide for the *three Assistant Superintendents* and the general assignment to them *of the duties which said old sections prescribed for the First, Second and Third Assistants*.

It is true that the amended Section 3236 authorizes the Deputy Superintendent to act as Superintendent of Streets in the absence of the Superintendent, an authority, which, under repealed Section 3238 was delegated to the First Assistant. This single excerpt from the latter section, however, cannot be taken as establishing the grade and rank of First Assistant. The council had a perfect legal right to transfer this particular authority from an existing inferior officer to one of higher rank and grade created by the council.

City of Chicago v. Luthardt, 191 Ill. 516.

The reason for the transfer of this authority to the Deputy Superintendent in this case is obvious; and in our opinion the mere authority to act as Superintendent in the absence of such Superintendent, did not operate to raise the grade or rank of the First Assistant above that of the Second and Third Assistants. If this test might be applied for such purpose, then a similar, but much more convincing test, might be applied to demonstrate that both the positions of Second and Third Assistant Superintendents are higher in grade and rank than that of the First Assistant, as we shall presently show. In connection with the consideration of the comparative grades and ranks of different officials or employes engaged in the same line of service, the following language of the Supreme Court is pertinent:

“It is said that, where an employe is authorized to exercise control in the absence of the chief officer of the department, such employe ought to be considered a head. There is nothing in the act which justifies the application of any such rule, in order to determine who are the heads. It is also said that, where an employe has charge of the hiring and employing of a large number of men, and the expenditure of large sums of money, and is to

be appointed only with the mayor's concurrence, and whose position is next to that of the chief of the whole department, such an employe must be considered a head of a division or department under his supervision. There is nothing in the act which justifies the application of any such test as is there indicated. It is also said that if any employe has confidential and business relations with the chief officers in any branch of the city service he is to be deemed a head. This test is also without sanction in any of the terms of the act."

People, ex rel. v. Kipley, 171 Ill. 44, 80.

The numerical adjectives, first, second and third, applied to the Assistant Superintendents under the original ordinance, do not establish three grades or ranks of such assistants. Such adjectives are applied merely to distinguish the three assistants, just as they distinguish the first, second and third national banks, in any city without necessarily establishing the comparative financial standing or rating of such banks. The use of these adjectives was necessary to properly designate the three Assistant Superintendents under the provisions of the original ordinance, but such adjectives are not necessary and the therefore dispensed with in the amendatory ordinance, because the three Assistant Superintendents are distinguished by the respective districts to which they may be assigned.

The test which, if it might properly be applied, would tend to make the positions of the Second and Third Assistant Superintendents of higher grade and rank than that of the First Assistant is this: The work of the Second and Third Assistants under the original ordinance is to be done only under the supervision of the Commissioner of Public Works; they are not made subordinate to the Superintendent of Streets as the First Assistant is, nor are they subordinate in any manner to the First Assistant. But this test, like the other single tests considered, is not controlling.

The Supreme Court, in the case of *The People, ex rel. v. Errant*, 229 Ill. 56, in holding that salary classification alone does not determine the right of promotion, laid down the fol-

lowing general test for determining the right to promotion under Section 1 of Rule 7 of the City Civil Service Commission:

“Under this rule, classification for promotion must be from rank to rank, except as otherwise provided, *in the same line of service*. The requirement that the promotion is to be in the same line of employment rests on the rational basis that careful and studious attention to duties of one station or place has an educational tendency to prepare one for advancement to a higher position in the same line. In our opinion the proper construction of these rules is that promotion shall be made upward,—that is, toward the higher salaried place from the grade next below in the same line of employment,—and that the same line of employment means those positions in the various departments, the duties of which are so related to the duties of the higher place that a thorough knowledge of them is in a degree preparatory for the duties of the higher position.”

That the First, Second and Third Assistant Superintendents of Streets are of equal rank and grade in the same line of service next in order of promotion to the new and higher office of Deputy Superintendent of Streets is so decided, we think, by the Supreme Court in the case of *The People, ex rel., v. Errant*, 229 Ill. 56. In that case, which was an action for mandamus to compel the Civil Service Commissioners to hold a promotional examination for the position of Assistant Superintendent of Streets in charge of street and alley cleaning, the court said (p. 58):

“It appears that the Superintendent of Streets is the head of the Bureau of Streets, and his immediate superior is the Commissioner of Public Works. Next in rank to the Superintendent of Streets *are* the Assistant Superintendent of Streets, and the Assistant Superintendent of Streets in charge of street and alley cleaning. It is stipulated, among other facts, that the duties of Assistant Superintendent of Streets, ever since the year 1897 and down to the filing of the petition, have always been the superintendence, subject to the orders of the superintendent of streets, of all matters pertaining to street, sidewalk, culvert and crossing repairing, and all the work pertaining to the streets and alleys of the city, excepting the work of street and alley cleaning and garbage removal. It is also stipulated that neither of

these Assistant Superintendents, the Assistant Superintendent of Streets or the Assistant Superintendent of Streets in charge of street and alley cleaning, has been or is subject to the orders of the other, but both alike are subject to the Superintendent of Streets, and there is no intermediate office between the latter and his two subordinates above mentioned."

Since the foregoing construction was placed on the positions in the Bureau of Streets as it existed at that time, provision has been made by the Council for an additional or third Assistant Superintendent, the three assistants have been denominated First, Second and Third, the First Assistant has been delegated to act as Superintendent in the absence of the Superintendent and the Second and Third Assistants have been taken from the supervision of the Superintendent of Streets, and placed directly and solely under the supervision of the Commissioner of Public Works. But the relationship of the three Assistants and their general line of service remains the same, and the court's construction above set out applies to place the First, Second and Third Assistant Superintendents in the same grade and rank in the same general line of service, and next in line of promotion to the new office of Deputy Superintendent of Streets.

It is our opinion, based on the foregoing reasoning and authority, that the present First, Second and Third Assistant Superintendents of Streets are entitled, without further civil service examination, to be assigned to the position of the "three Assistant Superintendents of Streets, and that they, as comprising all persons engaged in the next lower position or place in the same line of service, are entitled to participate in a promotional examination for the new office of Deputy Superintendent of Streets, and that such new office can lawfully be filled in no other way.

Very respectfully submitted,

FRANCIS J. VURPILLAT,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Application for Injunction by Rejected Bidder to Restrain City from Letting Contract—Whether City Should Proceed Before Temporary Injunction is Entered.

October 2, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

Your letter with reference to the contract entered into with the Electrical Contracting Company was referred to the undersigned for consideration and reply.

Said contract contemplates work estimated at upwards of \$400,000.00 and the same was duly signed about August 12, 1924. It was approved by the Corporation Counsel on August 19, 1924, countersigned by the Comptroller on the same day and approved by the Mayor on August 20, 1924. A copy of it was delivered to the contractor on August 21, 1924. It appears that the contract was let as a result of an award made on competitive bids.

There does not seem to be any irregularity with respect to the advertisement, award or execution of the contract in question. The reason you asked advice concerning same is because an application was made by one of the unsuccessful bidders for an injunction restraining the City's officers from entering into the contract and from paying out any money thereon.

A bill for such injunction was filed on August 21, 1924, at 5:07 p. m. This was unquestionably after the last formality had been duly complied with. The bill prays for an injunction restraining the Commissioner of Gas and Electricity from issuing any orders for work, from permitting any work to be done by the contractor and from approving any bills of the contractor. The bill also seeks to enjoin the Comptroller from auditing bills and from approving same or signing checks or warrants. The Mayor and the City Treasurer are also included within the prayer of the bill, as persons who should be restrained from allowing money to

be paid out on checks or warrants. The contractor is also made a defendant to the bill and the complainant seeks to enjoin it from doing any of the work or furnishing any of the labor or material.

The bill is very elaborate in details and consists of 15 or 20 typewritten pages and a large number of exhibits. No effort, however, was ever made to secure a temporary injunction thereon, and no order of court of any kind affecting the rights of the parties has been entered.

We have given the bill close attention, and if we had found anything that we considered an irregularity set forth therein we would have advised the Commissioner of Gas and Electricity long before this to hold the matter in abeyance and not to proceed with the work. We would have done this even though we do not make it a practice to recommend the stopping of the business of the City upon the mere filing of a bill of complaint. We did not find any substantial grounds for complaint, however, and about six weeks have elapsed without any move being made on the part of the complainant for a temporary injunction. We believe that fact in itself casts a doubt on the good faith of the complainant, since he must have been aware of the fact that the contract had already been let at the time that he filed his bill. Such being the case, we see no reason for departing from the practice that we have always adhered to in such cases, and we recommend that all officers of the City concerned in the matter should proceed with the work in the same manner as if no bill had been filed.

We, therefore, beg to advise you that, since no injunction has been granted or even applied for by the complainant since he filed his bill, you are in a position to issue warrants in settlement of vouchers duly presented as the work proceeds.

Yours truly,

LEON HORNSTEIN,

Approved: *First Assistant Corporation Counsel,*
FRANCIS X. BUSCH,
Corporation Counsel.

Pension Rights of Retired Police Matron Who is Drawing Pension from the Municipal Employees Fund, in View of New Law Treating Police Matrons as Members of Police Department.

October 8, 1924.

THE RETIREMENT BOARD, Municipal Employees Annuity and Benefit Fund.

Gentlemen:

Replying to your letter of October 4th, relative to the pension rights of Mary Walworth, I submit the following:

Mary Walworth, a matron in the Police Department, was placed on disability January 16, 1919, under Section 9 of the Municipal Employees Pension Fund Act of 1911; she is now 55 years of age, with a service credit of 19 years.

Section 52 of the Municipal Employees Annuity & Benefit Fund Act, approved June 29, 1921, provides (second paragraph) as follows:

“All annuities, pensions and other benefits allowed prior to the first day in the month of January of the first year after the year in which this Act shall come in force and effect in such city, by the board of trustees of such municipal pension fund shall thereafter be paid by the said retirement board from the annuity and benefit fund herein provided for, according to the law or laws under which such annuities, pensions, or other benefits were allowed.”

While police matrons are now treated as members of the Police Department, pensionable out of the police pension fund, it was the evident intention of the legislature at the time of the passage of the present Municipal Employees Pension Act, that all benefits theretofore being paid under the Municipal Employees Act of 1911, should continue to be paid in accordance with the law of 1911, out of the present Municipal Employees Annuity and Benefit Fund. I am informed

that Mary Walworth has at all times been paying her regular monthly contribution into the Municipal Employes Fund, which contributions have been accepted and credited to her pension account in that fund, in accordance with the provisions of the Act of 1911; the law does not provide for the transfer of a beneficiary, under these circumstances, from one fund to another.

I am of the opinion that Mary Walworth should continue to be paid out of the Municipal Employes Annuity and Benefit Fund, in accordance with the Municipal Employes Pension Fund Act of 1911.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Employment of More Clerks in Municipal Court Than
Authorized in Appropriation Bill When There
Are Sufficient Surplus Funds in
the Appropriation.**

October 8, 1924.

HON. MARTIN J. O'BRIEN, Comptroller.

Dear Sir:

We have your letter of recent date in which you inquire whether the Municipal Court Clerk has authority to employ 284 deputy clerks for a limited period in place of the 261 provided for by the Annual Appropriation Bill if there is salvage enough in his appropriation to pay for such extra deputies.

It appears that there were appropriations made for deputy clerks at various salaries; that the total number so allowed was 261; that, by reason of employing a less number in some instances and some at a lesser salary in other instances, there is an unexpended balance on hand which would enable the clerk to employ the 284 deputies which he now has on his pay-roll. The question of the sufficiency of the appropriation which would cut a figure if there was not money available is not involved and therefore we do not consider it in answering your inquiry.

Section 15 of the Municipal Court Act provides that the clerk shall appoint such numbers of deputies as may be determined "from time to time" by a majority of judges of the Municipal Court by orders signed by them and spread upon the records; the salaries of such deputies to be fixed "from time to time" by similar orders, and the same to be payable out of the treasury in monthly installments. There is nothing in that section of the law which requires the judges to make such determination at any particular time of the year or which requires that the orders in reference to them should be entered only once a year before the passage of the Annual Appropriation Bill. In other words, there seems to be no check on the judges as to when they may act in this respect.

Under the recent decision of the Supreme Court in *People ex rel. Egan v. City of Chicago*, 310 Ill. 534, it was held that a provision of the statute similar to the one just referred to amended certain provisions of the Cities and Villages Act, and is in full force and must be construed as changing provisions in the Cities and Villages Act which conflict therewith.

Our opinion, therefore, is that the provision of the Municipal Court Act which says that the judges may fix the number of deputies from time to time, gives such judges authority to do so at any time of the year, and if a sufficient amount of money has been appropriated to pay for the deputy clerks hired in pursuance of their orders it may be done, although in some instances it may require the transfer of an appro-

priation in order to enable the city's disbursing officers to pay out the money.

If there were not sufficient money available under the appropriations made in the Annual Appropriation Bill or proper amendments thereto authorized by statute a different question would be presented, which we have avoided in this opinion.

Yours very truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Proposed Water Supply to Indiana Harbor Belt R. R. Through Village of River Grove.

October 9, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We are in receipt of your communication of recent date relative to the above entitled subject together with copy of letter written by Mr. Samuel K. Markham, attorney for the Village of River Grove, wherein he raises the question of the legality of the Village supplying water to the Indiana Belt Railroad Company's yards, and in answer will say the paragraph in the contract between the City of Chicago and the Village of River Grove covering the question raised by Mr. Markham, reads as follows:

"It is Further Expressly Understood And Agreed By And Between The Parties Hereto, That the said Village of River Grove shall at no time permit any water furnished hereunder to be used to supply consumers residing without the limits of the district or territory com-

prising said Village of River Grove, except, however, that said Village of River Grove may furnish water to consumers residing without said district but abutting upon the streets which form the boundary lines between the Village of River Grove and the adjoining municipalities, or abutting a street or roadway along which the connection with the mains of the City of Chicago are made, and where such municipalities are now or may hereafter be included within the Sanitary District of Chicago and become entitled to receive water supply from the said City of Chicago."

We are of the opinion that the Village of River Grove has the right to sell water to consumers at its boundry lines as above provided, and that it is not necessary to obtain Council action or to amend the contract between the City of Chicago and said Village of River Grove.

Very truly yours,

THOS. W. FLYNN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Legality of a Single Bond Issue Covering Improvements of Different Streets.

October 10, 1924.

HON. ROSS A. WOODHULL, Chairman Committee on Finance.

Dear Sir:

In your letter of recent date you state that the city will be short of funds for the payment of public benefits assessed against it on certain street improvements where bonds have already been issued, and that in addition to this there will be need of money to meet the assessments for such public benefits in the case of certain streets for which no bond issues

have been authorized. You ask whether it will be possible for the city to submit a single bond issue proposition to a referendum vote to meet public benefits on six or seven different streets.

Upon further inquiry we have ascertained that the streets which you have in mind are Michigan avenue, Ogden avenue, Western avenue, Randolph street, Twenty-second street, and Indiana avenue, and that all of these are parts of one comprehensive plan of street widening and improvement evolved by the Chicago Plan Commission as a means of relieving traffic congestion in the City of Chicago.

It is important to note that there is one general purpose in these improvements. We point this out because in the case of some of them the funds will not be required to meet deficiencies but are intended for use on assessments that will be levied in the future. We have no doubt that under the authority of *People ex rel. Carr v. C. & N. W. Ry. Co.*, 308 Ill. 54, where it was held that bonds were properly issued to pay indebtedness that had accrued, an issue of bonds to pay assessments already levied for public benefits on different improvements which are not related to each other would be upheld. There is, however, some doubt where the bonds are intended partly for purposes that cannot be construed as indebtedness if the objects of purposes do not relate to one general improvement or class of improvements.

The question you ask does not appear to have been directly passed on by our Supreme Court, and the decisions in other states are not altogether in harmony. But the law seems to be that where a matter is submitted to a referendum the voters do not have a chance to express their clear choice or preference if it is coupled with another proposition, that is not related to it, in such a manner that both have to be voted on by the same vote.

The constitutional and statutory provisions relating to the issuance of bonds do not prohibit bonds which are issued for more than one purpose. (See Art. IX, Sec. 12 of Const., and Art. V, Sec. 1, Cl. 5 of Cities and Villages Act.) In fact,

in the statute providing for a referendum on bond issues, we find that the substance of the ordinance that is submitted for approval must be so stated in the proposition to be voted on that "the purpose or purposes for which such bonds or obligations are to be issued" appears therein, but that it is not necessary that "such ordinance" shall be printed in full. This gives rise to the thought that there may be two or more "purposes" in issuing bonds, but it hardly lends color to the idea that these purposes may relate to entirely different subject matters.

The general principle which governs, in the absence of an express provision of the statute, is thus stated by a leading text writer:

"Even when there is no direction as to the form in which the question shall be submitted to the voters, it is essential that it be submitted in such manner as to enable the voters intelligently to express their opinion upon it, and for that purpose the proposition should be submitted to them separate and distinct from any other proposal which is not germane to the question upon which a vote is desired."

Dillon on Mun. Corp., 5th Ed., Sec. 891.

In the case of *Stern v. Fargo*, 26 L. R. A. (n. s.) 665,, where the question was squarely presented, and where, as in our state, there was no express statutory provision on the subject, the court stated that "the authorities are nearly unanimous to the effect that a proceeding by which two questions are submitted, when such questions or their subjects and purposes are not naturally related or connected, is invalid." The court then goes on to cite a long list of authorities, among which are some Illinois cases, and says they "are all squarely to the effect that the submission of double questions in such a manner as to require a vote for or against both is illegal."

The Illinois decisions thus cited are old cases which arose on questions relating to bonds giving municipal aid to railroads; hence, the application is not as clear as it might be,

but the general principle is stated. Thus, in *Williams v. People ex rel. Wilson*, 132 Ill. 574, Magruder, J., says:

“The submission of two separate propositions to subscribe for stock, or of a proposition to vote on two roads at the same time, has been condemned by this court as a fraud on the voters, because they have no choice in such case but to vote for or against both propositions, and are virtually forbidden to vote for one road if they do not also vote for the other.”

We would, therefore, not recommend the submission of a proposition for bonds which contained provisions for financing two or more widely separated objects or purposes.

The rule, however, appears to be different in a case such as you present, where the object in each case relates to the same general subject-matter. A few instances of such plans being upheld will illustrate the distinction we are trying to draw.

In *Oakland v. Thompson*, 151 Cal. 572, where a city had in contemplation the acquisition of several distinct parcels of land, widely separated, it was held that the scheme being a single scheme, it was unnecessary that each piece of land should be voted on separately.

In *Linn v. Omaha*, 76 Neb. 552, it was held that the submission of a proposition for bonds for constructing fire engine houses at two different places in the city was not contrary to law and that the proposition did not contemplate bonds for a dual purpose.

The general purposes of “city parks and sewers” were declared to be germane in *Louisville v. Park Commrs.*, 112 Ky. 409.

We could cite other cases which clearly indicate that where the purposes of a bond issue are related to each other they come clearly within the purview of the statute requiring submission to the voters which states that the “purpose or purposes” must be set forth in the proposition. From a

careful consideration of these, we feel convinced that the proposed issue of bonds will be held valid if duly approved by the voters.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Liability of City for Damages to Fence Caused by City's Ash Wagon.

December 10, 1924.

HON. ROSS A. WOODHULL, Chairman, Finance Committee.

Please refer to your letter, addressed to the Corporation Counsel, regarding the claim of Joseph Wyszczelski, 2042 North Hermitage avenue, for damage to the platform and fence at 3910 Ferdinand street during the month of July, 1923, caused by a City ash wagon.

In our opinion the City of Chicago is not legally liable for the damage sustained in this instance, as in the collection of ashes and garbage the City is performing a governmental function, for the purpose of the comfort and health of the general public, which exempts the City from liability for the negligence of its employees engaged therein.

However, we are enclosing a letter from the New York Indemnity Co., the concern that insured the team owner, which is self-explanatory and contains an offer to make a reasonable adjustment with Mr. Wyszczelski for the actual damage sustained to the fence. We suggest the claimant take the matter up directly with the Insurance Company.

We are also enclosing reports from the Superintendent of the 28th Ward, and Mr. Thos. H. Byrne, Superintendent of Streets, together with your files.

Respectfully submitted,

LAWRENCE J. FENLON,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Proposal to Abolish Position of "Police Operator"
and to Regrade Same as "Police Patrolman."**

October 10, 1924.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

In a communication to the Corporation Counsel of date September 30, 1924, you present an existing state of facts pertaining to the Police Department, express your desire to effect a certain change of policy thereon, and request advice as to "the legal procedure necessary to accomplish this end." Our opinion cannot well be given without incorporating your communication, which is as follows:

"In the present organization of this Department there is provision made for a Chief Police Operator, Assistant Chief Police Operator and one hundred and forty-seven police operators.

In my plans for the operation of the Department and the appropriation for this year, I desire to have the police operators regraded as patrolmen and to change the title of the positions of Chief Police Operator and Assistant Chief Police Operator to that of Chief of Signal Service and Assistant Chief of Signal Service, respectively. There are at present one hundred and thirty-one police operators civil service employes.

In my estimate for next year's appropriation, I intend to ask for the present number of police operators (147) at their present rate of salary (\$2,000) a year up to the 1st of July, and after the first of July to ask for the present civil service number (131) at the same rate of salary as first-class patrolmen and to have them come under the caption of first-class patrolmen, thus abolishing the rank of operator.

Will you please advise me the legal procedure necessary to accomplish this end as soon as possible, and oblige."

Frankly speaking, the proposed change is a drastic and radical one in view of the provisions of the Civil Service Act and the long established rules of the City Civil Service Commission thereunder; and it seems quite difficult, if, indeed, not actually impossible of accomplishment.

Section 41 of the Civil Service Act (Ch. 24½, p. 441, Smith-Hurd Ill. R. S. 1923) enjoins upon the Civil Service Commission *the duty to "classify all the offices and places of employment in such city, with reference to the examinations hereinafter provided for, except those offices and places mentioned in Section 11 of this act."* And Section 42 charges said Commission with *the duty to "make rules to carry out the purposes of this act, and for examinations, appointments and removals in accordance with its provisions, and the Commission may, from time to time, make changes in its original rules."*

Under Rule 1 of the City Civil Service Commission's Rules of June 1, 1920, the Police Department is given a general classification as "Branch IV. Public Safety. Embracing positions the duties of which involve *the operation and efficiency of the Police Department of the City Government and work related thereto,*" and is given a special classification as "Class S. Police Service embracing *positions in the active ranks of the Police Department and positions directly related to the performance of police duty.*"

It will be observed that both general and special classifications of the Commission make the basic distinction be-

tween those positions in the *active police service* and those which are merely *related thereto*. Patrolmen are rated and classed as in the active police service while operators are rated and classed as engaged in a service merely "related to the performance of police duty." This classification is based, according to Section 3 of the rules, on the "relative kind and character of work" in the positions. Another rule providing a more definite classification is that stated in Section 5, which is as follows:

"Grade and Rank Contrasted. Grade is more inclusive than rank within the meaning of these rules. In situations where the ascertained status of positions herein classified into grades accords to one group or individual a definite or acknowledged standing over another, the recognition of rank shall take precedence over grade. The Commission shall define rank for examinations and appointments in its official notices of examinations and in the minutes of its proceedings and shall determine in each instance the distinction between ranks, the necessity for examination from rank to rank and eligibility thereto. *Rank shall be held to include only those offices and places of employment performing the same particular kind and character of work and of equal authority and precedence.*"

The last sentence of this rule seems to make impossible the placing of patrolmen and operators in the same rank. Merely changing the name of operator to that of patrolman, as proposed, will not make the respective services of such operator and patrolman "the same particular kind and character of work and of equal authority and precedence," so as to constitute but one rank of the two positions. Abolishing the *name* of operator will not abolish the *rank and grade* of the operator's "line of service" in relation to the present service of patrolmen. The actual distinction between the lines of service in the two positions is inherent and cannot be abolished. Therefore, if the operators should be "regraded as patrolmen," there would, of necessity, exist the same distinction in rank between the new patrolmen doing the work of the present operators and those doing the duty of the present patrolmen. The foregoing distinction is accentuated by the

Commission in its policy of declaring the rank of the operators such as not to make them eligible to promotional examinations for the position of patrolmen.

Had the City Council the power and the Civil Service Commission the disposition "to have the operators regraded as patrolmen," it would seem possible to do so in name only. And Section 7 of the rules provides that:

"Titles shall be indicative of the branch, class, and grade or rank of each position in the classified service and changes shall be reported to the Commission."

The same title, therefore, cannot reasonably and consistently be applied to two distinctive ranks of service. Patrolmen doing active police duty and those doing operators' work would have to be distinguished in some manner.

The City has power under the Cities and Villages Act to create offices and generally to provide for employments and positions in the public service to be filled in accordance with the City Civil Service Law. And the City may, in good faith, also abolish and discontinue such offices and positions when the same become no longer necessary or useful.

Cities and Villages Act, Sec. 2, Art. VI, Hurd's Stat. 1916, p. 311.

The People ex rel. v. Coffin, 282 Ill. 599, 604, 606.

The City Council cannot, however, reclassify or regrade existing offices and positions, for this is within the exclusive jurisdictions of the City Civil Service Commission under the Civil Service Act.

Smith-Hurd Ill. R. S. 1923, Sections 39 to 77, Ch. 24½, p. 441.

The City Council could not, therefore, even upon the proposed "estimate for next year's appropriation" and the accompanying recommendation of the head of the Police Department to that effect, by such an appropriation ordinance "abolish the rank of operator" by providing for the change of name of police operator to that of patrolman. In connec-

tion with this the consideration of Section 8 of the Commission's rules is important. - That section follows:

"Status of Positions. Whenever any office or place is created or raised in grade or rank or re-established, the Commission shall determine the facts, and the branch, class and grade or rank to which it properly belongs, and no person shall be awarded any right or title to any position unless acquired by virtue of an examination held under these or preceding rules."

Under the existing rules of the Commission the position of operator is not even classified as one in the same rank as that of patrolman, and an entirely different examination is required for it. As we have already observed, the operator is not even recognized as in a similar line of service as the patrolman, so as to make the operator eligible to promotion to the position of patrolman. And a mere change in the name of operator could not, under the Civil Service Law and the Commission's rules, legally have the effect "to have them come under the caption of first-class patrolman," as proposed. It is not the name nor an arbitrary classification, grading or ranking that determines the status of positions, but, as declared by the Supreme Court, the comparative or relative lines of service of such positions.

The People ex rel. v. Errant, 229 Ill. 56.

Because there exists a material distinction between the positions of police operator and patrolman, inherent in their respective lines of service, the one active police duty, the other only "work related thereto," we know of no legal procedure by which the *rank* of operator can be abolished and the positions of operator and patrolman amalgamated. What might be accomplished by the unanimous action of the Police Department, the Civil Service Commission and the City Council in the matter proposed is conjectural at best.

Very respectfully submitted,

FRANCIS J. VURPILLAT,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

**Account Between City and County for the Boarding
and Lodging of Prisoners in the House
of Correction.**

October 14, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We are replying to your formal communication of February 1, 1924, which was recently referred to us, and which has to do with the long standing, unsettled account between the City of Chicago and the County of Cook.

Referring to the contract of January 1, 1891, for the boarding and lodging of prisoners in the House of Correction, we are herewith submitting a form of new contract for execution by the parties, as recommended by you.

We have examined the "statement of the account between the County of Cook and the City of Chicago *in re* boarding of prisoners at the House of Correction and sundry other charges," also some items of recoupment and set-off demanded of the City by Cook County. We note that some effort at adjustment of the account or compromise in settlement has been made which has proved futile.

It seems to us that this situation between the two municipalities is one which is peculiarly adapted to arbitration, and one which can be more satisfactorily and expeditiously settled by submission to arbitration under the provision of the Act of June 11, 1917, Arbitration and Awards (Ch. 10, Cahill's Ill. R. S., 1923) than by any judicial procedure in law or equity. We would suggest, therefore, that such arbitration be proposed to the Cook County Board for settlement between the City and County of all matters of account between them.

As provided by Section 1 of said Act, the parties

"may in such submission, agree that any court of competent jurisdiction, or any court therein named (provided

it is of competent jurisdiction) may pass upon any questions of law arising in such arbitration proceedings."

Such questions of law as may arise may be presented to the court in briefs and thus determined for the arbitrators. And Section 14 of the Act provides that:

"Writs of error and appeals may be taken from the decision of the court upon questions of law under Section 6 of this Act, or matters arising in the course of the proceedings, by the party feeling himself aggrieved, as in other cases."

We are returning herewith as requested "copy of the contract and sundry letters, etc.," which belong to the files of the House of Correction.

Very respectfully submitted,

FRANCIS J. VURPILLAT,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Power of Commissioner of Buildings to Tear Down Dangerous Walls.

October 14, 1924.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

We have your communication of the 10th inst., wherein you direct our attention to a building located at 525 West 43d street in the process of being torn down, but because of a party-wall agreement a controversy has arisen which will indefinitely delay the work of destruction. Your letter is accompanied by photographs showing a brick wall three stories in height without any support above the second floor.

An investigation by this office reveals that the adjoining land owner because of this agreement has served notice upon the owner of the building about to be razed that he will hold him liable for damages if this party wall is torn down, and lest there be merit to the claim, the work has been stopped and a perilous situation impends. Neither of the parties has thus far sought the aid of the court to determine their respective rights, and for months nothing has been done.

The City is not anxious to become involved in, nor precipitate litigation, but where a building is left in a weak or ruinous condition and liable to fall and do injury to innocent people, it thereby becomes a public nuisance and as such should be abated.

Under Section 405 of The Chicago Municipal Code of 1922 you have the power to direct the Fire Department to tear down or remove any defective walls which are in a dangerous condition. In view of the party wall controversy affecting this structure, it would be well to tear down just so much of the wall as would remove any hazard to life and property, notices having already been served in accordance with our ordinances.

Very truly yours,

JAY A. SCHILLER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Unlawful Occupation of Sheds for Residential Purposes—Ejection of Occupants by Police.

October 14, 1924.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

We have your communication dated October 9th in which you ask for an opinion as to the advisability of having the

Fire Department wreck two sheds in the rear of premises located at 7008 South Oakley avenue and 7223 South Rockwell street because they are made use of for living quarters instead of for garage purposes.

We suggest in this instance that formal notice be served upon the occupants of these sheds to immediately vacate the premises for the reason that their occupation is in violation of Section 488 of The Chicago Municipal Code of 1922, which requires the approval of plans by your department before a structure can be converted from one use to another. It would be well to state in your notice that failure to remove their belongings within ten days from date of notice will result in their being forcibly dispossessed.

You do not state that the sheds as erected for use as garages are not in conformity with the ordinances for such purposes, and it is assumed that originally they were in compliance with the ordinances. It is then merely a question of an unlawful use of the premises for the purposes of habitation.

Were the occupants to vacate, peacefully or otherwise, the structures remaining would not *per se* violate any of the building ordinances, and therefore the destruction contemplated by your department would be an unwarranted exercise of police power. The buildings could be restored to garage uses in accordance with the original plans, and come within the purview of our laws.

In event that the occupants refuse or fail to vacate within the period allotted them, you are at liberty to authorize the Department of Police to assist you in ejecting the families and their household goods.

Very truly yours,

JAY A. SCHILLER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Whether Operation of a Gum Vending Machine Constitutes a Gambling Device.

October 15, 1924.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

You have requested this office for an opinion as to whether the operation of the gum vending machine known as "The Famous 1-2-3 Vendor" is gambling.

The above mentioned machine consists of a large glass globe which contains various colored balls of candy coated gum. Toward the bottom of the machine is a lever, and at the base of the machine is an opening at which the gum is delivered. A poster on the machine states "one cent—one ball; two cents—two balls; three cents—three balls; pull lever for each ball." When the machine is operated by placing a penny in the slot and pulling a lever, one ball of gum is delivered. When a penny is inserted for the second time, two balls are delivered, and when a penny is inserted for the third time, three balls are delivered. In other words, if the machine is played three consecutive times, six balls are always delivered.

If every person playing the machine always put in three cents, he would know exactly how many balls of gum he was about to receive, and there could be no gambling element, Or, if the machine indicated in advance whether it was about to pay one, two or three balls for a penny, so that the person operating it would know exactly what he was to receive for his money, then there would be no gambling element.

There is a gambling element in the operation of this machine, however, in that the person about to play the machine does not know whether the machine is going to deliver one, two or three balls for the first cent. In other words, if the person last playing the machine did not continue play-

ing it until he received three balls for one cent, there is an opportunity for the person next playing it to receive three balls for the first cent. Since any person playing the machine has an opportunity to receive three balls of gum for the first penny he inserts, and since this fact may operate as an inducement to the operation of the machine, the machine is a gambling device.

In conclusion, we advise you that the machine, in its present condition, is a gambling device, and is in violation of the ordinances of the City and the laws of the State. However, if this machine were so arranged that it indicated exactly how many balls were to be delivered upon each operation, then it would not be a gambling device.

Respectfully submitted,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Election Law—Separate Ballot for Bond Propositions.

October 15, 1924.

HON. FRED V. MAGUIRE, Chairman, Board of Election Commissioners.

Dear Sir:

We have your letter of recent date, in which you ask to be advised whether or not the Street Improvement Bond proposition and Street Lighting Bond proposition may be printed on the same ballot with other propositions to be voted for on November 4, 1924, or whether it is necessary to print these City propositions on a separate ballot by themselves.

In our opinion, the Election Law, and all other laws which require the printing of propositions on separate bal-

lots will be liberally construed for the purpose of enabling the voters to give an expression of opinion with as little confusion as possible. To that end, the Supreme Court has held that it was less confusing for the voter to receive one ballot containing a number of propositions than to receive a number of ballots with separate propositions on them.

In the case of *People ex rel. Vance v. Elledge*, 281 Ill. 592, there was before the court a proposition for a special tax for hard roads and some other propositions which need not be particularly set forth. The point was made that, because the law as to each of these propositions required that they be placed on separate ballots, it was unlawful to place them all on one ballot; but the court held otherwise. It quoted Section 16 of the Ballot Law, which plainly intends that a ballot may be used on which there is more than one question to be voted on, and then uses the following language:

“It is clear from the wording of this section that the legislature did not intend a separate or special ballot for each proposition to be submitted to the voters. This is the reasonable and natural construction of this section, and it has been assumed, so far as we know, by this court and all public officials that had to do with the question, that all propositions should be printed upon a ballot separate from the ballot upon which the candidates’ names were printed but all propositions upon the same ballot.”

People ex rel. Vance v. Elledge, 281 Ill. 592.

The same ruling was adopted in *Baker v. County of DuPage*, 224 Ill. App. 167.

Prior to the adoption of the above rules it was held in *Harvey v. Cook County*, 221 Ill. 76, that the proposition to adopt the Torrens Law had to be printed on the same ballot as the ones used for voting on candidates for office, but that was on account of the special statute which expressly provided for that. Again, it was contended in the case of *People ex rel. Woods v. Meyers*, 256 Ill. 529, that a separate ballot could

not be used, but the court held that such an election as was then under discussion could be held either at a regular election or a special election held for that purpose, and then said:

“It does not require a ballot at a general election different from that at a special election, and the separate ballot was not unauthorized by law.”

In other words, the court in this case also takes the view that the use of the words “separate ballot” have to do with the distinction between the ballot used for candidates for office and the ballots on the propositions submitted. It is true that in the present instance a special election on these bond issues was called. It was probably not necessary to do this, and the ordinance might have provided for the submission of the bond issues at the regular municipal election to be held on November 4th. This could even have been done by resolution. The mere fact, however, that the City Council saw fit to designate the election for votes on these propositions as a special election does not in any way change the status or bring into question the right to proceed as if the election on the bond propositions were a part of the general elections. We might hesitate about saying that these bond propositions may be placed on the same ballot with the proposition for the Constitutional Amendment, etc., if there was to be no general municipal election on November 4th. But since there is a general municipal election on that day, we are convinced that the courts will hold that it is entirely proper to place all the propositions to be voted on upon the same ballot.

Yours very truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Revision of Civil Service Lists of Eligibles—Laches as Bar to Question Ratings.

October 17, 1924.

HON. GUY GUERNSEY, Chairman, Committee on Harbors,
Wharves and Bridges.

Dear Sir:

Receipt is acknowledged of your communication of the 3d instant in which you state:

“Testimony before the Committee appointed by Mayor Dever to investigate the Fire Department makes it appear there were irregularities in the marking of the last Battalion Chiefs’ examination which resulted in keeping Captain Cowhey and others entirely off of the list of twenty-nine who were certified.

If in your opinion this list can be revised lawfully and the injustices, if any, removed, it would be desirable to have it done.”

Upon investigation of the records of the Civil Service Commission and from conferences with the Secretary and President of the Commission, we have obtained the following information:

1. Lists of eligibles from which certifications were made were posted 1920; that they expired 1922, two years ago.

2. That “there were irregularities in the marking of the last Battalion Chiefs’ examination which resulted in keeping Captain Cowhey and others entirely off of the list of twenty-nine who were certified,” as indicated by the “testimony before the Committee appointed by Mayor Dever to investigate the Fire Department,” is apparently true to this extent only, as stated by officials of the present Civil Service Commission, that the Commission, as at that time constituted, gave to some higher “efficiency marks” than they merited and to others lower efficiency marks than should have

been given to them. That there were other irregularities in the markings is considered by them as improbable and lacking of proof.

3. The Secretary of the Commission states that a revision of the grades is practically impossible because it would establish a dangerous precedent and would tend to undermine and destroy the integrity and stability of the Commission's records, and keep all certified candidates in a state of uncertainty as to their declared status.

In the particular case to which you make reference, that of Captain Cowhey, the records show that he received the following marks in the examination subjects:

Knowledge of the City	66.50
Laws and Ordinances	59.50
Duties or Special Subject.....	59
Efficiency	75
Seniority	81
Physical examination	82.45

His general average was 69.15.

As a legal proposition, your attention is directed to the fact that this application is made more than two years after the posting of the list, and that no complaint of the applicant for a correction has been made within that period. Our courts have repeatedly held that a delay of this length of time constitutes laches, and bars the applicant's right to relief.

If there is any further information that we can give you in this matter, we would be glad to serve you.

Very truly yours,

FRANCIS J. VURPILLAT,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Computation of Pension to Firemen According to
Salary at Time of Retirement—Rights of Em-
ployes Who Paid Into the Firemen's Pension
Fund but Have Since Been Transferred
to the Department of Gas
and Electricity.**

October 20, 1924.

HON. AL F. GORMAN, City Clerk.

Dear Sir :

You have requested the Corporation Counsel for an opinion relative to certain questions which arose at the meeting of the Board of Trustees of the Firemen's Pension Fund held on October 7, 1924.

The first question is whether employes of the Fire Department, who were retired and became pensioners prior to October 1, 1924, should receive pensions computed according to the salary which they were then receiving, or according to the salary fixed by the Annual Appropriation Bill of 1924, to become effective October 1, 1924. The Annual Appropriation Bill for 1924 provides in Paragraph 35-A-4 that the salary of firemen shall be paid at a certain rate per annum to October 1st, and after October 1st, the rate per annum is increased. All firemen who were retired prior to October 1st, were receiving salary at a lower rate. The holding of the Appellate Court, in the case of *O'Neil v. Harding*, was that the pension of any pensioner should be computed according to the rate of salary which he was receiving at the time of his retirement; and, further, that any subsequent increase in salary of the rank which he formerly held would not affect his position. According to the holding in that case, the pension of firemen retired prior to October 1, 1924, should be computed according to the salary which they were then receiving, and not according to the subsequent increase. It

may be observed that the *O'Neil* case is now pending in the Supreme Court, but unless the Supreme Court should reverse the opinion of the Appellate Court, we shall, of course, follow the opinion of the Appellate Court.

The second question, concerning which you have asked an opinion, is in regard to the status of Harry Leser and Michael Hanley, employes of the Fire Department, recently transferred to the Department of Gas and Electricity. It appears that the appropriation of the above named employes of the Fire Department were transferred by the Annual Appropriation Bill of 1924, from the Fire Department to the Department of Gas and Electricity. The following Council order was passed on July 15, 1924, for the purpose of protecting their pension rights:

“Ordered, That the Fire Commissioner be and he is hereby authorized to carry on the Fire Department payroll, the Superintendent of Construction and the Chief, Fire Alarm Wires, who have been employed in the Fire Department and assigned to the Department of Gas and Electricity and who have been covered by the Fire Department Pension Act, said rolls to be certified by the Fire Commissioner, based upon time rolls certified by the appropriate official of the Department of Gas and Electricity. The employes named are to be assigned to duty in the Department of Gas and Electricity by special order of the Fire Commissioner and to be subject to all the rules and requirements of the Department of Gas and Electricity as to duties, discipline, etc., pay-rolls for said employes to be paid out of appropriations made for these positions in the Department of Gas and Electricity.”

Under the above quoted Council order the Fire Commissioner is authorized to carry these employes upon the Fire Department payroll. The rolls are paid out of the appropriations made for these positions in the Department of Gas and Electricity, and the employes are then assigned to duty by the Fire Commissioner to the Commissioners of Gas and Electricity.

Section 13 of the Firemen's Pension Fund Act defines firemen to be:

“All persons who have been or shall hereafter be appointed to any position which is classified by the Civil Service Commission of such City in the fire service of such City. All other persons who at the time this act shall become effective shall have contributed to any fireman’s pension fund then existing, shall be included within the meaning of the term ‘fireman’ or ‘firemen’ as used in this Act, and shall be entitled to the benefits of this Act.”

The two above named employes, viz., Superintendent of Construction and Chief, Fire Alarm Wires, have contributed to former firemen’s pension funds. They are therefore included by the Pension Fund Act as persons who have formerly contributed. We are, therefore, of the opinion that the pension rights of the above named employes are in nowise jeopardized or affected by the fact that their salaries are being paid from the appropriations made for the Department of Gas and Electricity. They maintain their full status as members of the Fire Department, and their pension rights are not impaired.

Yours very truly,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

(Editor’s Note: See case of *O’Neil v. Harding*, 233 Ill. App. 444; 314 Ill. 516.)

Validity of Rule Providing for Emergency Head of Fire Department.

October 20, 1924.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

You have advised the Corporation Counsel that pending the issuance of the Rules and Regulations of the Fire

Department, which you are now preparing, you deemed it feasible to issue in advance the following rule:

“NOTE: Pending the issuance of Rules and Regulations under the new ordinance, which has been somewhat delayed by waiting several opinions to be given by the Corporation Counsel. In order that the department will not lack authority even for an instant, the following EMERGENCY rules will be in effect:

Whenever the Fire Commissioner is unable, for any cause, to maintain command of the department, all the power and authority of the Fire Commissioner shall vest in the Chief Fire Marshal. In the event of the absence or disability of the Fire Commissioner and Chief Fire Marshal, the Deputy Chief Fire Marshal shall exercise the powers and authority of the Fire Commissioner. In the absence or disability of all three of the above named officers, the power and authority aforesaid shall devolve upon the division fire marshals in the following manner:

Arthur R. Seyferlich.
Jeremiah McAuliffe.
Patrick Egan.
James Costin.
Frank E. Smith.
Michael J. Corrigan.
Daniel J. Carmody.
James Crapo.
William Dillon.
Andrew Gillespie.
John P. Stahl.

Next in order shall be Battalion Chiefs according to length of service.”

You have requested an opinion concerning the legality of the above quoted rule. The amended Fire Department ordinance makes it incumbent upon you to prescribe necessary and proper rules and regulations from time to time, to which all officers and employes of your department shall be subjected. It is further provided in Section 1163 of said ordinance that “all subordinate officers and employes of the Fire Department shall be subject to such rules and regulations, and shall perform such duties as shall be prescribed or required of them by the said Fire Commissioner or the ordinances of the City.”

The purpose of the above quoted rule is to provide for an emergency head of the Fire Department in order that the occasion may never arise within the department when there is no responsible person in command. This is a most salutary provision, for it is particularly important in a semi-military organization, such as the Fire Department, that it should never be left without some person upon whom the full authority and responsibility has devolved.

Since the above quoted rule is only to operate during emergencies, and does not attempt to alter or change the status of officers as created by the Fire Department ordinance except for emergency purposes, we are of the opinion that you are fully within the powers conferred upon you by ordinance in adopting the said rule.

Yours very truly,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Duty of Municipal Reference Librarian to Furnish Public Library With Free Copies of Municipal Publications.

October 20, 1924.

MR. FREDERICK REX, Municipal Reference Librarian.

Dear Sir:

I beg to acknowledge receipt of your letter of the 17th instant making inquiry as to whether Section 2406 of The Chicago Municipal Code of 1922, taken in conjunction with the ordinance passed by the City Council on July 2, 1923 (C. J., page 782), concerning sale and distribution of copies

of city documents and publications, requires that the Municipal Reference Library should furnish to the Chicago Public Library, free of charge, six copies of each of such municipal documents and publications.

In my opinion there is nothing in the passage of the ordinance of July 2, 1923, which either expressly or by implication repeals the provisions of Section 2406.

Accordingly you are advised that you should furnish the Chicago Public Library, free of charge, with six copies of all municipal documents and publications.

Very truly yours,

FRANCIS X. BUSCH,
Corporation Counsel.

**Operation of Institution Relative to Dissemination of
Knowledge Pertaining to "Birth Control."**

October 24, 1924.

HON. HERMAN N. BUNDESEN, Commissioner of Health.

Dear Sir:

You have notified the Corporation Counsel that an institution for the purpose of disseminating knowledge relative to the use of contraceptive devices is being operated at 308 North Michigan boulevard. You state that the Department of Health is opposed to the dissemination of this knowledge, and you request an opinion relative to your legal powers to prevent the operation of the same.

Our understanding is that this institution proposes to give oral instructions relative to the use of contraceptive devices and that it is a product of the so-called "birth control" movement, which has been agitated in this country in recent years. Some time ago a proceeding was started in mandamus by the people who are operating the present in-

stitution, for the purpose of requiring the Health Commissioner to grant a permit to operate a clinic designed to give information and knowledge with regard to this subject. This proceeding was taken on the theory that the dissemination of this knowledge by doctors constituted a clinic. The mandamus case is now pending before the Appellate Court.

Apparently the persons desirous of establishing this institution have now abandoned the idea that it is necessary for them to obtain a permit, and are proceeding on the theory that this is not a clinic. Although the City might prosecute them on the theory that they are operating a clinic without a license for the same, in our opinion the result of such prosecution would be very doubtful, in that we do not believe that the giving of oral instructions in so-called "birth control" methods constitutes, in law or in fact, a clinic.

There is no statute or City ordinance which directly forbids or makes it unlawful for any person orally to impart this knowledge. There is a City ordinance which makes it unlawful to sell, give away or distribute any printed or written matter relating to articles or means of preventing conception or to advertise concerning the same. (Section 2671, 2672 and 2673 of The Chicago Municipal Code of 1922.)

It is our belief that the most efficacious way of putting an end to this and similar institutions, is for the City Council to adopt an ordinance declaring such an institution a public nuisance and providing for the abatement of the same. The City of Chicago is given the power by Section 75 of Article V of the Cities and Villages Act "to declare what shall be a nuisance, and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist." By Section 8 of Part 3 of "An Act to amend an Act entitled 'An Act to provide for the incorporation of Cities and Villages,' " approved May 18, 1905, it is further provided that "The City Council shall by ordinance, be empowered to declare and define nuisances and abate the same.

The courts have frequently held that under such a grant of power the City Council may declare to be a nuisance any occupation which is in fact a nuisance, and to provide for the abatement of the same. Inasmuch as the dissemination of this knowledge is opposed to public policy, and inasmuch as it may be said that the wide-spread dissemination of this knowledge may well have the effect of tending to break down the moral order of our society and to encourage promiscuous relationships, we believe that the City Council would not exceed the bounds of its discretion in declaring such an institution to be a nuisance by ordinance. In our opinion such an ordinance might be sustained in the courts.

If you desire such an ordinance to be prepared, we shall at once draft the same and submit it to you. The earliest meeting of the City Council at which such an ordinance could be introduced will be Friday, the 31st day of October, 1924.

Respectfully submitted,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

(Editor's Note: See case of *People ex rel. Carpenter v. Dever*, App. Ct. No. 29342.)

**When Council May Reconsider Ordinance—Power to
Determine Rules of Procedure—Contract
Ordinance May Not be Repealed.**

October 30, 1924.

HON. JOSEPH O. KOSTNER, Chairman, Committee on Local
Industries, Streets and Alleys.

Dear Sir:

We have your letter with reference to the ordinance vacating part of DeSoto avenue between East 74th street and

East 75th street and part of an adjacent alley. Your inquiry relates to the present status of this ordinance.

The ordinance in question was passed at the meeting of the City Council held July 15, 1924, and appeared on page 3589 of the Council Journal of that date. It purported to vacate the portion of the street and the portion of the alley indicated above. There were certain conditions attached thereto, all of which seem to have been fulfilled. The ordinance was signed by the Mayor on July 18, 1924.

At the meeting held October 22, 1924, which was the next succeeding regular meeting of the City Council following the meeting at which the ordinance was passed, the City Council undertook to reconsider the vote by which the ordinance was passed and to re-refer it to the Committee on Local Industries, Streets and Alleys. Apparently the action taken at the October meeting was intended to be in conformity with the Council's Rule 35, a part of which reads:

“A vote or question may be reconsidered at any time during the same meeting, or at the first regular meeting held thereafter.”

Your inquiry is directed principally to the legal effect of the action thus taken at the October meeting.

Under Section 7 of Article III of the Cities and Villages Act it is provided that the City Council shall determine its own rules of proceeding. This rule has been construed to mean that, as to all matters of procedure which are not contrary to statutory requirements, the council rules will prevail.

Swift v. People, 162 Ill. 534.

People v. Davis, 284 Ill. 439.

People v. Strohm, 285 Ill. 580.

It should be noted that the rule for reconsideration is limited to a vote or question. This is significant, because it clearly applies only to such matters as have not been definitely disposed of. In other words, to matters, on which no

action has been taken that can be regarded as a finality. If the rule were otherwise it would be contrary to the provisions of Section 18 of the same article, which provides for the taking effect of ordinances that are signed by the Mayor.

A section in the former charter similar to our present Section 18 was passed upon by the Supreme Court in the case of *Skinner v. City of Chicago*, 42 Ill. 52. In neither the old nor the new section is there any express provision that upon the signing of an ordinance by the Mayor it is to take effect, but in both there is a provision which by implication has that meaning. The language in the two is so nearly alike that it can hardly be distinguished. The court, in passing on the old act, used the following language:

“The section declares, that, if not approved or returned within five days after it is presented to the mayor, it shall take effect in the same manner as if he had signed it. It will not be contended, that such an act, signed by the Mayor on the last day allowed him for consideration, takes effect from the day it is presented to him. It manifestly takes effect from the date of its approval. That is the last act necessary to its passage and to give it effect. Then when it is never signed by the Mayor, how can it be said to take effect in the same manner as if signed by the mayor, when it is insisted that it takes effect at an earlier period than it would have done, if it had been signed by the mayor. * * * By attaching his signature, it takes effect at that precise time, and so when the last moment of time has transpired without the action of the mayor, the law gives it effect from that time. There is nothing in the language of the act to authorize a different construction.”

Skinner v. City of Chicago, 42 Ill. 52.

The above case has never been overruled and it may therefore be said it is the law of the state that the signing of an ordinance has the effect of making it a law. Such is the plain intent of the statute, and the decision above quoted from is in harmony with all the textbooks in this regard.

(See Dillon on Mun. Corp., 5th Ed., Sec. 570.)

The decision in the case of *People v. Davis*, 284 Ill. 539, is sometimes looked upon as an authority holding that a matter may be taken up at the subsequent meeting of the City Council under a proper rule, even though the Mayor has approved it in accordance with the statute. That case arose by reason of the reconsideration of the approval of certain appointments by the City Council. The whole case, however, hinged on the proposition that the matter could not have been definitely settled until the time within which a motion to reconsider was possible had expired. It had nothing to do with an ordinance that had become a law. Therefore, the fact that it was decided in that case that the vote by which the confirmation was made was not definitive can have no bearing on an ordinance which has actually become a law. It was not an ordinance that the Mayor had signed.

The attorney for the Car-Dumper and Equipment Company exhibited proof of payment, dedication, recording, etc., showing that all conditions required of it have been fulfilled. The reconsideration, therefore, can have no legal effect, and the ordinance in question must stand.

We have not been asked to pass on the question of whether a repeal would be valid. That is an entirely different subject. Nevertheless, we will state that the general rule is, that where an ordinance in the nature of a contract has been duly passed and accepted and work has begun thereunder, a repealing ordinance will not have the effect of abrogating it.

Yours very truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Policy of the City at Sale of Real Property on Account
of Delinquent Special Assessments.**

November 5, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

In accordance with your usual custom you have asked us to outline a policy to be pursued by the City's Tax Agent at the forthcoming sale of real estate on account of delinquent special assessments.

The writer has conferred with the City's Real Estate Agent and the City's Tax Agent and finds that the policy adopted last year has resulted in a marked improvement with respect to the recovery of such delinquencies. It would seem from this that the remedial legislation which we secured at the last session has helped us and the situation is restored to practically what it was before the penalty was reduced, with respect to the number of purchases that were made (taking into account the increased number of assessments) and the ability to handle same in such a way as to secure the largest return. On the other hand, the expense to the city has been largely reduced by reason of the elimination of the fee for registering certificates under the Torrens Act, and in other respects.

Practically the only change that we will suggest this year will be with reference to the small items. We recommended last year that items of less than \$1 should be withdrawn. We are advised that these very small items, and in fact any items amounting to less than \$3, cause so large an expense to the City for securing the certificate, making search as to whether it is under the Torrens Act, carrying on the books of the City, and other things, that it is not worth while to withdraw. In fact, it would pay the City, if it could be legally done, to cross off or mark "Paid" items of less than

\$1. Since this cannot be done, however, we recommend forfeiture of all items of less than \$3. By this means, if the property is redeemed the original assessment will be paid over to the County Collector without any penalty that has accrued, but the city will be relieved of the necessity of carrying these matters on its books and doing all the work attendant thereto.

We therefore recommend that in all cases where the amount of the delinquency is \$3 or more, the City's Tax Agent should buy in the property at the sale in default of other bidders. Where the amount is less than \$3 the property should be forfeited.

In making these recommendations, however, we do not wish to be understood as limiting the discretion of the City's Tax Agent too greatly. We believe that he should use his judgment at the time of the sale even though we are mapping out a general policy for him to follow. It is often the case that a certificate of sale can be procured for a number of parcels in one block or even in one subdivision, and in such event it would be well to bunch the items and secure a certificate of sale even though the individual items amount to less than \$3. There are other respects in which the City's Tax Agent should exercise his judgment which it is not necessary for us to enlarge upon.

No distinction need be given to the delinquent assessments levied before 1915, upon which we have only a five years' lien, and assessments that have been levied since that time, on which we have a perpetual lien. The old assessments are becoming fewer in number each year and we believe the general policy outlined above will work out well with respect to the property in question.

We would like to be advised from time to time as the sale proceeds whether anything occurs which indicates to the City's Tax Agent that we have not pursued the proper policy. It frequently happens that the tax buyers will change their attitude on account of something the City's Tax Agent does in pursuance of our recommendation and unless we are

informed of that while the sale is in progress we could not advise you with reference to it until next year. We deem it proper, therefore, that we should be told of anything out of the ordinary that may happen in the course of the sale.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Law Requiring Registration of Death Certificates.

November 7, 1924.

HON. HERMAN N. BUNDESEN, Commissioner of Health.

Dear Sir:

Your letter addressed to the Corporation Counsel requesting an opinion in reference to the registration law requiring death certificates has been referred to me for reply.

1. The provision of Section 9 that "for deaths in hospitals and institutions the personal and statistical particulars required herein shall be furnished by the physician or person in charge of the hospital or institution, who shall obtain the information from the records of said hospital or institution, as made and provided for in Section 16 of this Act," plainly requires information from the records and not a mere reference to the records as the phrase "hospital records." The records from which this information is to be obtained must be kept and made up in the manner prescribed by Section 16. That section requires that in case of persons admitted or committed "for medical or surgical treatment of disease or injury, the physician in charge shall specify for entry in the records the nature of the disease or in-

jury, and where, in his opinion, it was contracted or received. The personal particulars and information required shall be obtained from the individual himself if it is practicable to do so, and when they cannot be so obtained, they shall be secured in as complete a manner as possible from relatives, friends or other persons acquainted with the facts." The superintendents or managers, or other persons, in charge of hospitals, almshouses, lying-in or other institutions, public or private, to which persons resort for treatment of diseases, confinement or are committed by process of law, are charged with the making of these records.

We think that Section 7 does not apply to deaths in hospitals. The specific and separate provision of Section 9 for deaths there occurring with directions as contained in Section 16, is a definite and exclusive provision for the certification of deaths in hospitals, and therefore your inquiry as to whether the person in charge of the hospital or institution should be considered competent to authenticate personal particulars is not a question under the section. The section we believe contemplates deaths not occurring in hospitals and institutions, and a medical certificate is separately required therefor, while personal particulars must be authenticated by an informant who is nearest of kin or who is acquainted with the facts.

2. "Would the local registrar be justified in withholding the burial or removal permit, in the following cases:

(a) Where personal particulars are left blank or marked "unknown," and the informant is akin to the deceased, as brother, sister, son or daughter?"

If informant is next of kin an explanation of why such particulars are not known to him should be made in the certificate attached thereto.

(b) "Where there are erasures or alterations in personal particulars or statement of cause of death?"

These should be explained if it is impossible to make out another certificate, for want of time, etc.

(c) "Where statement of cause of death is incomplete or where terminal condition is stated without the primary cause?"

There must at least be a compliance with the items of the United States Standard Certificate of Death. (See Section 7.)

(d) "Where death occurred in a hospital and certificate is signed by a legally qualified house physician in whose service the death occurred, instead of the attending physician?"

If it is meant by "in whose service death occurred" that such physician treated the patient as his physician, we think he would be qualified to make the certificate; also, in the absence of the attending physician.

(e) "Where entire certificate was evidently written in one hand, including signature of informant, physician and undertaker?"

To this inquiry we would say that this is not in compliance with the law.

"3. Section 8 provides that 'In case of any death occurring without medical attendance, it shall be the duty of the undertaker to notify the local registrar and the coroner. If no suspicion of death from violence, casualty or undue means exists, the local registrar may make the certificate and return from statement of relatives or persons having adequate knowledge of the facts.'"

Such information or evidence as to satisfy a reasonable mind; if a reasonable doubt remains he should not make the certificate.

4. It would not be unreasonable to ask a new certificate when it is illegible, erased, interlined or altered. Furthermore, we think such imperfect statements should not be accepted in the beginning.

5. We would emphatically say yes to the question whether the local registrar could demand that hospitals and institutions should obtain the personal particulars required

in death certificates at the time patients are admitted to the hospital or institution, if the person is unattended by relatives or friends.

6. We have carefully read the two opinions rendered by the undertakers' association attorneys and believe them to be correct in their conclusions.

Yours very truly,

CORA B. HIRTZEL,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

**Signature of Contractor to Final Voucher—Waiver of
Claim for Extra Work Not Included in Contract.**

Chicago, November 7, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

You ask to be advised as to the proper course to pursue in the matter of issuing final voucher to the Fitz Simons & Connell Dredge & Dock Co. for the west substructure for the Adams Street Bridge in order that the interests of the City may be fully protected.

It appears from copies of letters which you attached to your communication that there is a final estimate and voucher prepared amounting to \$31,800.14, of which \$22,480.52 is for the percentage retained until final completion under the terms of the contract. The usual form of waiver and release of all further claims and demands is endorsed thereon. It is conceded, however, that there has been some work performed in addition to the regular contract. The question is whether the contractor, in accepting this voucher and sign-

ing the waiver and release, yields any right as to the payment of the extra work.

In the letter of the Commissioner of Public Works to you under date of October 16, 1924, he states that two bills for such additional work have been presented by the contractor, that the two claims are valid, and that it only remains for the Department of Public Works to determine the additional amount due.

Under these circumstances such waiver and release would have no effect on the claim of the contractor. It would bind the contractor in case a dispute was pending and he accepted this payment as final and in settlement of controverted claims, but is of no consequence where other claims outside of and in addition to the amount due under the contract are conceded.

Inasmuch as you regard it as essential that there should be no departure from the usual practice of requiring the signature of the contractor to such waiver on the final voucher, and it would be establishing a troublesome precedent to permit it, we suggest that you arrange the matter in this case by showing the agent of the contractor the letter from the Commissioner of Public Works above referred to and telling him that in view of all the circumstances he may safely sign such waiver without sacrificing any rights.

Yours truly,

LEON HORNSTEIN,

Acting Corporation Counsel.

Sale of Real and Personal Property Owned by City.

November 7, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We beg leave to acknowledge receipt of your letter of the 30th ult., inquiring whether or not it is possible for the

City to enter into an agreement for the exchange of City property reserved for use as mounted police headquarters for a site better suited for such purpose located nearby.

Very clearly do our statutes in "An Act to authorize any city or village to sell real estate or its right and title therein, and to sell, convert or otherwise dispose of personal property belonging to it, when such real or personal property shall no longer be necessary or useful to, or its longer retention be for the best interests of, such city or village; and to repeal an act named therein," set forth the only manner of disposition of the City's real property, i. e., to *sell* such property when the same shall * * * be no longer necessary * * *. In the same act it refers to the disposition of personal property as follows:

"651. Sale of personal property with or without advertisement.) Section 4. Whenever any city or village incorporated under any general or special law of this State shall own any personal property which, in the opinion of three-fourths of the members of the city council of any such city or of the board of trustees of any such village, shall be no longer necessary or useful to, or its longer retention be for the best interests of such city or village, such majority of such city council or board of trustees may, at any regular meeting or at any special meeting called for such purpose, by ordinance authorize the *sale* of such personal property in such manner as it may designate, with or without advertising the same, or such majority of such city council or board of trustees may at such meeting authorize any of its officers to *convert* such personal property into some other form that is useful to such city or village by using the material in same, or such majority of such city council or board of trustees may at such meeting authorize any of its officers to *convey or turn in any article or articles of such personal property as part payment on a new purchase* of any similar article or articles: *Provided, however, that no article shall be turned in as part of the purchase price on any purchase except when competitive bids have been received in such manner as may be prescribed by ordinance after notice to all bidders that such article will be turned over as part of the purchase price.* (Calaghan's 1920 Stat., 1772 (4).)"

The legislators in enacting this law setting out several ways in which personal property could be disposed of and in prescribing that the method of disposition of real property should be solely by means of sale, clearly intended that there shall be no other means of disposing of real property, such as by transfer of sites.

Very truly yours,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Claim for Damage to Land on Account of Dumping by City.

November 10, 1924.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

You have submitted to the Corporation Counsel the question of the alleged liability of the City for a claim of \$20,000 presented by John L. Hopkins, 110 South Dearborn street on account of the City's dumping refuse on property bounded by 83d street, 87th street, Dorchester avenue, and the New York, Chicago and St. Louis Railroad.

The facts revealed by the investigation of the Street Department are as follows:

On April 15, 1915, Charles C. Harrison, the then owner of the above described property, through his agents, gave a written license to one A. C. Nelson, 6727 Evans avenue, to

dump ashes and other solids on that part of the said property which is below grade. The said A. C. Nelson then gave permission to the City orally to exercise his right and to dump upon the property. The City thereupon entered upon the premises and dumped ashes and other miscellaneous refuse, other than garbage. This dumping was done with the knowledge of the real estate agents who represented the owner. As soon as the new owner gave notice, the City stopped dumping.

Although it is doubtful whether a license to dump on land can be assigned by the licensee, nevertheless, if the City can prove that the agent had notice, we are of opinion that this constitutes constructive notice to the owner, and that if he stood by and allowed the City to dump on the land, he could not then claim damages for the dumping. Aside from this question, however, it is the opinion of the City Street Department that the land, which was formerly low and swampy, was greatly benefited by the fill. Although the claimant, Mr. Hopkins, states that he had intended to use this land as a golf course, we do not attach much significance to this claim. We do not believe that the land could have been used as a golf course because the Street Department reports that it was low and swampy before the fill. The fact that the owner had given permission to A. C. Nelson to dump on the land and the fact that dumping was done by many private ash haulers during the time City teams were dumping on the property, would indicate that the past and present owners had no intention to utilize the property as a golf course.

In conclusion, we recommend that this claim be refused.

Very truly yours,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

**General Ordinance Providing for Elevation of All
Railroad Tracks—General Safety Provisions
Where Not Elevated—Crossing by
Surface Lines.**

November 10, 1924.

HON. F. J. TOMCZAK, Alderman, 39th Ward.

Dear Sir:

Replying to your letter of the 3d inst., we beg leave to inform you of the following:

In answer to your question about a general ordinance requiring the elevation of *all* railroad tracks, we desire to say that on February 23, 1893, a general ordinance was passed providing for the elevation of all grade crossings in the city by track elevation. It contained a provision dividing the City into three railroad districts and setting a time limit for the completion of track elevation in each district, viz., first district by January 1, 1895; second district by January 1, 1897, and third district, completing all track elevation in the entire City by January 1, 1899. This ordinance was strenuously objected to as too comprehensive and impractical, and early in the year 1900, and subsequent years to date, separate contract ordinances have been passed to apply to given situations.

Replying to your second query with reference to safety provisions where railroad tracks are not elevated, please be advised that The Chicago Municipal Code of 1922 contains the following sections with respect thereto:

- 3394. Requires lights on trains to be maintained in the night time. .
- 3396. Requires bells to be rung continuously.
- 3403. Requires flagmen to be stationed at street crossings.

Your third question is answered by Section 3403, which requires flagmen at crossings, and saying nothing about gates, it is merely an additional protection offered by the railroad company.

Your final question whether it is incumbent upon the street railway company to have its conductors leave their cars and look out for trains at railroad crossings is answered in this way: Section 3348 of the Code requires the street railway companies to maintain watchmen at steam railway crossings.

Very truly yours,

JAY A. SCHILLER,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

Status of Roadway Connecting Jarvis Avenue With Fargo Avenue—Prescriptive Use by Public for Statutory Period.

November 10, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Mr. Addison Blakely, writing in behalf of the Jarvis Avenue Business Association, states in his letter dated September 29, 1924, that the Association is informed that an attempt may be made to erect a building on the 50 x 100 feet marked "Old Depot Site" on the plat attached to the letter. Should that be done, the roadway now existing along the northeast side of the elevated right of way and connecting Jarvis avenue with Fargo avenue will be closed. You ask if this 50 x 100 foot piece is to be considered and treated as a public highway.

By quitclaim deed recorded November 12, 1889, in Book 2821 of Records, page 43, Samuel B. Chase *et al.*, conveyed the property in question to the Chicago, Evanston and Lake Superior Railway Company in consideration of \$1. A depot was built on part of the property, which was removed early in 1908 according to Chicago, Milwaukee and St. Paul Railway Company records. The latter company succeeded in title the C., E. & L. S. Ry. Co. The property has been forfeited for nonpayment of taxes for 1917 and succeeding years. Because of the indefinite way in which the property is described in the schedule of lands returned for taxation by the St. Paul Company it may be questioned that the company paid taxes on the property at any time.

The affidavits attached to Mr. Blakeley's letter show that the street running along the northeast side of the right of way, and over this property, has been used as a highway since 1890. Evidently the depot was a narrow structure which occupied only a small part of the property, if it was on this property at all, and not on the right of way.

Buildings now front on this property and on the remainder of the street south of the property. They are numbered as part of Jarvis avenue. The property with the remainder of the street to the northwest and southeast of it has been filled in by the City. The roadway completely covers it, and it cannot be distinguished from the rest of the street, about which there is no question.

As Mr. Blakely states in his letter, Sec. 1, Chap. 121, Illinois Revised Statutes (Roads and Bridges) declares that any road used by the public for fifteen years is a public highway.

This property has been uninterruptedly, openly and adversely used by the public as a street for more than twenty years. All the elements necessary to constitute a highway by prescription under the common law are present.

We are informed that some steps have been taken to lease this property for garage purposes. As the property, in our opinion, has become burdened with an easement of

public travel, the right to use it for private purposes is gone.

Answering your question in the last paragraph of your letter, we advise that this property is to be considered and treated as a public highway.

Respectfully submitted,

DANIEL V. GALLERY,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

**Tearing Up of Streets by Public Utilities—Duty to
Replace—Limitation on Use of Streets
by Heavy Trucks.**

November 10, 1924.

HON. WILEY W. MILLS, Alderman, 37th Ward.

Dear Alderman:

We are in receipt of your communication of the 5th inst. with reference to the tearing up of new pavement in Austin by a public utility corporation, and also to the use made of newly paved streets by heavy motor trucks.

We are unable to suggest any relief in the first case mentioned, for the reason that public utility corporations under authority of the Illinois Commerce Commission have full authority to open up the streets to lay their cables, conduits, mains, pipes, etc. The ordinances, however, impose upon the corporations a complete restoration of the street after openings have been made, to a condition equally as good as before it was open or disturbed under the said authority. Where, as in the instant case, the pavement is still under reserve of the guarantee period of the contracts under which said street was improved, it is mandatory that such replacement or restora-

tion shall be made by the contractor in accordance with the terms of his contract for the construction of such improvement. (Section 3714 of The Chicago Municipal Code of 1922.)

Concerning the desire on your part to prohibit heavy trucks laden with weighty loads from using Austin's newly paved streets, please be advised that some aldermen have secured the passage of ordinances establishing "heavy traffic prohibited" zones, which in our opinion cannot possibly be sustained if attacked, for the reason that the streets are public highways and their use for the kind of traffic that is permitted on other streets cannot be restricted. The only limitation that could be made would be by general ordinance limiting weight of loads except under conditions fixed, and as to this the City Council has already acted. (See Sections 4033 to 4043B of The Chicago Municipal Code of 1922, as amended February 21, 1923.)

In the Council Proceedings of October 22, 1924, page 3858, you will find an ordinance designating a heavy traffic zone such as is referred to above.

Very truly yours,

JAY A. SCHILLER,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

Licensed Auctioneer—May Not Delegate Agent to Act For Him.

November 12, 1924.

HON. THOMAS P. KEANE, City Collector.

Dear Sir:

Replying to your request for an opinion from this department as to whether or not Mr. Sidney Abelson, who is a licensed auctioneer and who is in ill health at present, may

delegate someone other than his regular assistant to act for him in case of emergency or temporary disability, we beg to advise that in our opinion, under the present ordinance, such substitution cannot be made.

Those sections of the ordinance regulating who may act as auctioneers at auction sales, read as follows:

“222. *None but licensed auctioneers to sell at auction.*) No person other than a licensed auctioneer shall sell at public or private auction. Any person who shall sell or attempt to sell at public auction in this city any real or personal property of any kind whatsoever (except under and by virtue of legal process or under and by virtue of a mortgage) without first having obtained a license therefor as herein required, shall be fined not less than twenty-five dollars nor more than one hundred dollars for each offense.”

“223. *Auctioneer to designate partners and assistant, if any.*) Every person licensed as an auctioneer shall, at the time he receives his license, file with the city clerk, a statement in writing, signed by him, designating his partner or partners, if any, and he may also designate a clerk that he desires to name as an assistant.

“At the time of the issuance of the license the city clerk shall incorporate the name of one other person who has been thus named either as a co-partner or clerk, and certify that said co-partner or clerk shall be known as an ‘assistant auctioneer,’ who may act as an auctioneer in place of the licensee.

“If any licensed auctioneer shall permit any other person than the one designated as his assistant to hold an auction sale in his name he shall be deemed guilty of a violation of this ordinance and his license shall forthwith be revoked. Any auctioneer who allows any other person than the one mentioned in his license as an ‘assistant’ to sell under his license shall be deemed guilty of a violation of this ordinance and said license shall forthwith be forfeited and no other license shall be issued to him for a period of one year.”

It is clear from the second paragraph of Section 223 that only one person other than the licensed auctioneer is authorized to act under an auctioneer’s license, whether that person be a clerk or a partner of the licensee. This provision is

intended to reduce the possibility of fraudulent practices in a business in which such possibility of fraud is a recognized fact.

While it may be true, as in the particular case you call to our attention, individual hardship may result from such a regulation, the intent of all such legislation would be frustrated if sickness or like excuse on the part of the licensee could be made the basis for switching from one auctioneer to another of whom the city has no means of acquiring knowledge and consequently no control or means of regulating.

For the above reasons Mr. Abelson should not be allowed to appoint someone other than his regular assistant to act in his stead.

Very truly yours,

RUTH C. NELSON,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

**Liability of City for Damage Due to Burst Water Main
When City is Not Negligent and Uses Due
Diligence to Stop Leak.**

November 14, 1924.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

In response to your communication of September 13, 1924, relative to the claim of the Vitri-fyx Company for damages to property at 616-18 West Kinzie street, occasioned by the bursting of a water main, we desire to say that we have made an investigation of this matter. It appears from the reports that this water main which is located almost directly

under the sidewalk on the north side of Kinzie street and which runs directly east and west, was broken in some manner unknown, causing it to leak and flood the basement of the building at 616-18 West Kinzie street. No one seems to know just exactly when the leak occurred. It was discovered on June 2, 1924, and reported to the City at about 11:30 on that day. The repair crew, under Mr. Patrick Ryan, Assistant Foreman of the Water Pipe Extension Bureau, arrived at the premises between 1 and 2 o'clock of that afternoon. They immediately proceeded to shut off the water, but discovered that they did not have a valve key long enough to reach the shut-off valve which was located at a considerable depth under the surface of Desplaines street. This valve was located in Desplaines street between Milwaukee avenue and Austin avenues and about two hundred feet from where the leak occurred. The closing of this valve would shut off all the water flowing into the main which was leaking.

The fact that the repair crew did not have a key long enough to reach the valve necessitated their sending to the water pipe extension yard at 2342 South Ashland avenue for a longer valve key.

While waiting for the longer key, the crew started to excavate in the alley east of the building to locate the leak. After some time, the leak was located and the water came up through the hole made by the crew when they were digging to locate the leak.

A period of about five hours elapsed from the time the crew arrived at the premises until the water was finally shut off from the main. Before the crew had arrived there, a considerable amount of water had leaked through the wall of the basement at 616 West Kinzie street and covered about one-quarter of the surface of the basement floor to the depth of an inch and one-half.

The investigation made by this office shows that there was some moulder sand in the basement which had been wet by water and some papers and catalogues which had also been damaged by water. Our investigator found that three

paper cartons containing 15,000 window envelopes had been wet and stained by water and rendered practically useless, and 2,000 catalogues which had been stained and were apparently unfit for further use. Also 100 sample boxes one inch by five and one-quarter by two and three-quarters apparently damaged.

Miss M. C. Murphy, Treasurer of the Vitri-fyx Company, informed the investigator that the catalogues were manufactured by Wm. C. Kreicker & Company, 440 South Dearborn street, and that they cost 44c apiece, but that at that time she did not know the price of the envelopes which were made by the same company. She claimed that the sample boxes were worth from five to eight cents apiece.

Apparently the only claim for damage made by the Vitri-fyx Company is for the catalogues and the envelopes, no claim being made for damage to the building. The total amount of the claim presented is \$796. From the report and investigation made by this office, we are of the opinion that no liability attaches to the City for the damages occurring by the leaking of this water main.

The leak was not caused by any negligence on the part of the city, and the city, through its agent, after being notified of the condition, used diligence in making repair of the main. The mere fact that the water main broke would not of itself create a liability against the city, as this main was at a considerable depth below the surface of the street. The physical impossibility of making inspection of pipes laid at such a depth below the surface would or could not make it necessary for the city to make inspection. These pipes have been in for a considerable length of time, and the presumption would necessarily arise that they were properly installed when they were first laid. McQuillin on Municipal Corporations, Vol. VIII, page 8287, states:

“In all sewer or water main cases cited by the plaintiff in which the city was held liable there was either evidence of actual negligence in the construction or operation of the water main or sewer, or notice to the city authorities of the break or overflow, accompanied by

neglect on their part to repair promptly, or actual notice by reason of like prior occurrences that the sewer or pipe were defectively constructed or maintained. * * * A municipality is not an insurer of its water or sewer system any more than of its streets. It is required only to use reasonable care in establishing and maintaining such a system."

It will be noted from the investigation of this matter that at the time of the arrival of the repair crew whatever damage to the property of the claimant there was had already occurred and that even assuming that the repairs were not quickly and not efficiently made, there was no damage done to the property after the city was notified. From a statement made by Miss Murphy, it appears that the leak must have occurred on the first day of June, and that the water had been in the basement at least twelve hours before she or someone connected with her company had notified the City.

We are, therefore, of the opinion that the city is not liable for the damages claimed.

Very truly yours,

FRANK CORR,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Transfer of Item of Vehicle Fund Appropriation from One Department to Another.

November 17, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Your letter concerning the proposed transfer of money from the Vehicle Tax Fund which was appropriated to the Department of Gas and Electricity but which you now desire

to use for street repairs was referred to the writer for consideration and reply.

The sum of \$125,000 was appropriated from this fund to the Department of Gas and Electricity for the purpose of installing "illuminated street and warning traffic signs." (See Council Journal, p. 2335.) It is now your desire that \$12,000 of this amount be transferred to the Department of Public Works for street repair work. The Commissioner of Gas and Electricity consents to this proposal, but the auditor questions the power of the City Council to make the transfer, since it will be a transfer from one department to another. It is on this point that you desire an opinion.

The wording of the statute which authorizes the making of transfers of this kind is as follows:

"Section 2a. The city council of cities, and boards of trustees in villages having a population of one hundred thousand or more, shall, at any time after the first half of each fiscal year, have power, by a two-thirds vote of all the members of such body, to make transfers within the department or other separate agency of the municipal government, of sums of money appropriated for one corporate object or purpose to another corporate object or purpose."

Art. VII, Sec. 2a, Cities and Villages Act, Cahill, 1923, p. 423.

We have always given the above provision as broad an interpretation as possible, feeling that thereby we were not only carrying out the intention of the Legislature but were facilitating the work of the City Council and the heads of the departments as well, and to that end we have held repeatedly that such transfers can be made as between bureaus or activities within the same department, as long as the control remains under the same department head. But we have no ground for going beyond that. A transfer of a part of an appropriation for a given purpose in one department to another department for another purpose is not warranted by this statutory provision.

The only condition under which it would be proper for the head of a department to expend funds appropriated to another department would be in case the City Council, by ordinance, authorized him to expend money from such fund *for the same purpose*. In that event, we would not regard the procedure as a transfer of an appropriation, but merely the transfer of the authority to administer it. This we believe would be permissible under the law as interpreted in *City of Chicago v. Berger*, 100 Ill. App. 158. The proposed transfer, however, is of a different kind, and we can find no authority in law for it.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Licenses for Coffee Houses—Distinguished From Restaurants.

November 17, 1924.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

You have forwarded to this department a letter from the Acting Captain commanding in the 31st District, in which he states that Commanding Officers are somewhat at variance as to their views concerning their right to proceed against coffee houses operating without licenses; and you ask to be advised with respect to the position you should take in reference to this matter.

We regret to say that we are unable at this time to give you such an exact and positive declaration on the subject as would enable the average policeman to proceed understandingly and without danger of making a serious mistake. The situation is somewhat mixed, and we advise caution in

enforcing the license ordinances on this particular class of business.

Section 3439 of The Chicago Municipal Code of 1922 defines a coffee house as

“* * * a house, room or place where coffee as a beverage and other refreshments or meals are sold, served or supplied to the public, without reference to specific hours for meals, or during a period extending beyond midnight on each day, to be consumed on the premises. * * *”

While there is a certain distinctive air about a coffee house that is easily recognized, and which distinguishes it from an ordinary restaurant, there is nothing in the above definition that would not fit a restaurant that serves meals at all hours or beyond midnight. The Supreme Court has held, in *Potson v. City of Chicago*, 304 Ill. 222, that the City has no power to license restaurants. Therein lies the difficulty.

Notwithstanding the *Potson* case we have tried to enforce the city ordinance requiring license fees from coffee houses in all cases where the place could be readily distinguished from an ordinary restaurant. This seemed to be feasible for a while, but more recently parties have gone into court and secured an injunction on the theory that they were operating restaurants even though they come within the above definition. This has still further complicated matters, and until we get some authoritative decision which will define exactly what we can and what we cannot license under the name of “coffee house” we will have great difficulty in determining in each instance whether the ordinance applies.

Pending the final outcome of this controversy, we recommend that you enforce the coffee house license ordinance in all cases where the party holds out his place by advertisement or sign as a “coffee house” or “coffee shop,” also in all cases where you have information that customers make a practice of coming in and drinking coffee without eating a meal, whether it is before or after midnight, and in all cases where coffee and other beverages are served and there is not an actual restaurant run in connection therewith.

In other cases we recommend that you seek advice before making arrests, and that even when you proceed by summons you should resolve a doubt as to the necessity of procuring a license in favor of the owner of the alleged coffee house.

We are doing our utmost to arrive at some definite conclusion in this matter. We are preparing an elaborate answer in the case now pending, and hope to have the questions concerning "coffee houses," "ice cream parlors," "retail beverage dealers" and "ordinaries" decided therein. It will take some time to do this, however, and in the meanwhile we suggest that you follow the advice we give above.

Yours truly,

LEON HORNSTEIN,

Approved: *First Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Withdrawal of Frontage Consent for Filling Station Before Issuance of Permit.

November 18, 1924.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

This will acknowledge receipt of your letter of November 16th concerning a proposed filling station at 2200 North Cicero avenue. From your letter, we take it, that a frontage consent petition has been filed; that this petition shows, as checked by the Superintendent of Maps, a surplus frontage of 16.05 feet. On the frontage consent petition appear the signatures of Carl Unrath and Caroline Unrath, as owners of the 25 feet frontage. You also enclose in your letter a communication from Mrs. C. Unrath and Carl Unrath withdrawing their consent to the erection of the above filling station.

You ask us whether or not the permit should be granted.

The withdrawal of the consent of the Unraths will reduce the frontage consents below that legally required for the issuance of the permit. It appears from your communication and the exhibits attached thereto that you received the withdrawal of the consents before the issuance of the permit, and that upon the date of the withdrawal of the consents, to wit, November 15, 1924, final action had not been taken in the matter of the application of the permit.

It is too well settled to need citation of authorities that frontage consents may be withdrawn at any time before the permit is issued. (*Theurer v. The People*, 211 Ill. 296.)

We therefore advise you that the permit for this filling station may not legally issue until the frontage consents required by law are filed, and that at present it appears that the Unraths' consents being withdrawn, there are not sufficient frontage consents to warrant the issuance of the permit for this filling station.

Very truly yours,

W. L. SULLIVAN,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Prohibition Against Metered and Unmetered Water Service at Same Premises.

November 20, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We are in receipt of your communication of recent date together with all correspondence and records pertaining to the Robinson Coal Company at 726-750 East 41st street, and in answer will say that from an examination of the plat submitted to us we find a meter which measures the water used in a barn with ten single stalls—one box stall and one sink 4 feet by 1 foot by $1\frac{1}{2}$ feet, used as a water trough; that the

remainder of the premises upon which there is a garage, a room used as a kitchen by employes, weighing scales, coal bunker, coal shed, toilet room for yardmen, storeroom, coal conveyor, coal sheds, wagon shed, woodshed and a vacant flat, is all under frontage.

Sections 4137 and 4138 of The Chicago Municipal Code of 1922 read as follows:

“4137. METERED AND UNMETERED SERVICE FOR SAME PREMISES PROHIBITED—EXCEPTION.) The commissioner of public works shall not permit any building, structure or premises which is or are controlled by meter to have in any portion thereof a pipe connected with the city water-works system which is not also controlled by meter, excepting as hereinafter provided in this section.

“If it shall be found that any portion of such building, structure or premises is not controlled by meter, the owner, agent or person in possession, charge or control thereof shall be notified to bring such portion under meter control within ten days from date of such notice, and upon failure to do so, the supply of water shall be shut off and stopped forthwith, and shall not again be permitted to be turned on until there shall have been paid to the city such sum of money as the commissioner of public works shall deem properly due for the water service used in violation of the provisions of this ordinance and until the cost and expense of cutting off or stopping such water supply shall have been paid.

“The provisions of this section shall not apply to any building, structure or premises if a portion thereof is used for a lodging house in which the per diem maximum rate does not exceed forty cents per person, and in which baths are given free or at a rate not exceeding five cents, and in which all wash stands are equipped with self-closing faucets. Any portion of such building, structure or premises used directly for lodging house purposes, but excluding all other portions, shall be allowed to have an unmetered supply, and shall be charged assessed rates as provided in this chapter.

“4138. UNMETERED SERVICE FORBIDDEN FOR PREMISES REQUIRED BY ORDINANCE TO HAVE METERED SERVICE.) Where the ordinances of the City of Chicago require the water supply for any building, structure or premises, or any part thereof, to be under meter control, it shall be

unlawful for any person to connect any building, structure or premises, or any part thereof, or addition thereto, with any service or supply pipe other than a service or supply pipe controlled by meter.

"Where application shall be made for permission for connection at the main or for water service for any projected building or structure, or for any alteration or addition in an existing building or structure, which from the information given in such application would appear to come under any of the provisions of any ordinance which requires such building, structure or premises to have the water service pipe controlled by meter, said permit shall be authority to install metered service only."

As all of the real estate and buildings are occupied by the said Milton E. Robinson Coal Company as one tract or premises, and as a portion of said premises and buildings are under meter control and a portion of said premises and buildings are on a frontage basis, we are of the opinion that all of said premises should be brought under meter control in accordance with the provisions of the foregoing sections of The Chicago Municipal Code of 1922.

Very truly yours,

THOMAS W. FLYNN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Ordinance for Two Contracts Between the City of Chicago and the Nickel Plate Railroad in Connection With the Construction of Lake Calumet Harbor.

November 20, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

In compliance with your request to make a study of the proposed ordinance for the establishment of a boundary line

between lands, respectively, of the City of Chicago and The New York, Chicago & St. Louis Railroad Company, the conveyance of the railroad right of way, and other lands, to The New York, Chicago and St. Louis Railroad Company, the dedication of certain streets, the construction and operation of a belt line railroad, the reclamation of certain lands, the construction of a part of a harbor in Lake Calumet, and for other purposes, and to report upon the same in regard both to matters of law and of policy, I herewith submit for consideration the following:

I.

Section 1 of the proposed ordinance provides that the City and the company shall enter into two certain agreements, (1) an agreement for the establishment of a boundary line between lands of the City and of the Company and the acquisition by the City of certain riparian rights of the Company, and (2) an agreement for the conveyance by the City to the Company of a railroad right of way, and other lands, for the dedication of certain streets, the construction and operation of a belt line railroad, the reclamation of certain lands, the construction of part of a harbor in Lake Calumet and for other purposes. The first agreement is set out in Section 2; the second agreement is set out in Section 3; Section 4 authorizes and directs City officials to take such steps as shall or may be necessary to carry out said agreements; Section 5 provides that said agreements shall be executed within ninety days from and after the passage of the ordinance; Section 6 repeals a certain ordinance passed March 21, 1923, amending the Lake Calumet Harbor ordinance passed July 22, 1921; and Section 7 provides that the ordinance shall take effect and be in force from and after its passage and publication.

II.

The First Agreement.

1. Certain recitals contained in the first agreement at the top and toward the bottom of page 3 thereof, will need

to be changed in the event that certain provisions in the second agreement, hereinafter referred to, are changed.

2. The closing paragraph of Article I of the first agreement (page 5) provides that the first agreement shall not be effective unless and until the parties have entered into and delivered the second agreement.

III.

The Second Agreement.

1. The recital toward the top of page 21 sets forth that this second agreement, *has been duly approved* by the Commissioner of Public Works of the City of Chicago and as to the lands conveyed by the City to the Company, such conveyance has been approved by the Director of Public Works and Buildings of the State of Illinois, who has affixed the seal of his department to said instrument. Inasmuch as the matters and things embodied in this agreement are part of an ordinance which may or may not be passed or may be materially modified before passage, such recital at this stage does not seem appropriate.

2. Article I provides that the City conveys and warrants unto the Company, (a) a railroad right of way generally one hundred feet wide known and to be known as the Lake Calumet Harbor Railroad right of way (describing same); (b) also additional land for railroad purposes (describing same); (c) also an easement in a certain portion of Stony Island avenue as laid out on the Arend Van Vlissingen plans. The railroad right of way (a) is shown in red on the accompanying map, Exhibit "B," attached to the contract, and with two slight exceptions falls within the present water area of Lake Calumet and contains 88.134 acres. The water area of this right of way is granted to the City by the Harbor Act of June 24, 1921. The agreement calls for a conveyance in fee simple. It would seem that an easement would be sufficient for the purposes of the agreement. In any event a quitclaim deed from the City of these lands obtained from

the State should be taken and considered as sufficient. The additional lands for railroad purposes (b) are along the southwest side of Lake Calumet and lie inside or easterly of the said Lake Calumet Harbor Railroad right of way. These lands contain 11.375 acres and lie almost entirely within the present water area of Lake Calumet. No reason is set forth in the agreement why these additional lands should be conveyed to the Company for railroad purposes. The same observation in regard to quantity of interest and kind of deed or conveyance applies to these additional lands as above set forth with reference to the railroad right of way.

The paragraph at the middle of page 22 provides that the lands described in items (a), (b) and (c) shall not be liable for any special assessment for street improvements on any of the streets shown on said Arend Van Vlissingen plan, and provides that the corporate authority of the City approves the apportionment of all such assessments which would otherwise be chargeable against said lands to other harbor lands of the City lying between the railroad right of way and the Entrance Basin or Anchorage Basin. Such a provision I deem illegal under the Local Improvement Act. (See Section 39 of the Local Improvement Act.)

3. Provision should be made in the L. A. Lowrey Tariff for switching, to and from points within the Chicago Switching District, that the *Company* shall absorb the switching charges of the Calumet Harbor, on such switching.

4. The second paragraph at the top of page 25 is as follows:

“It is mutually understood and agreed that upon the confirmation by the Circuit Court for Cook County of those certain boundary line agreements heretofore entered into between the City and owners of riparian lands bordering Lake Calumet, which agreements provide for certain easements across said railroad right of way, *the City will exercise its power and authority reserved in such agreements to require the grantees therein to exercise their rights thereunder in such manner as not to interfere with the construction, maintenance or operation*

by the Company of its belt line railroad herein provided for."

The agreement does not make clear just what rights of the riparian owners the Company desires the City to require such riparian owners to exercise with respect to the Company's construction, maintenance and operation, or in what manner. Inasmuch as this paragraph is vague and uncertain in its meaning, and for the further reason that the City would not be desirous of making requirements upon such riparian owners which cannot at this time be foreseen, it would seem better to omit this paragraph.

5. Article II on page 25 provides that the City grants, conveys and warrants in fee simple to the Company, with proper or necessary plat attached to the deed or deeds, certain lands on said page 25 described. These lands are now submerged under the waters of the northeasterly portion of Lake Calumet. They lie west of and on the water side of the Lake Calumet Harbor Railroad right of way, are indicated by red hatching on Exhibit "B" attached to the agreement, and exclusive of East 110th street contains 105.67 acres. It would seem that as the City receives these lands from the State of Illinois, a quitclaim deed instead of a warranty deed should be considered sufficient for all purposes.

6. In the paragraph at the top of page 27 there is reserved to the Company the use of certain strips of land and street (East 103d street) for its tracks. As East 103d street is a section line and is intended for a through street, will it be possible to use 103d street at the north end of Lake Calumet both for railroad tracks and general street traffic?

The paragraph following refers to a possible separation of grades in East 103d street in the future. Should not such separation be definitely provided for in this agreement?

7. In Article V at the top of page 28, 6th line, in the description of the channel or first construction unit, I am informed by Mr. De Groot of the Division of Survey that it should read 73 degrees 28 minutes 28 seconds instead of 70 degrees 29 minutes 28 seconds.

8. Section 2, Article V, provides for the reclamation of certain lands and the disposition of spoil. As a safeguard to the City's interests in this respect it is recommended that the words,

“and with the permission and approval of the Commissioner of Public Works of the City to be given,”

be inserted after the word “option” in the fourth line of Sub-paragraph (6) of said Section 2 near the bottom of page 29 of the printed agreement.

9. According to data furnished by the Survey Division, the lands to be acquired by the Company under the two agreements are as follows:

Railroad right of way	88.134 Acres
Additional lands for railroad purposes..	11.375 Acres
Lands to be conveyed under Article II....	105.670 Acres
Lands lying northeasterly of the boundary line which the Company expects to acquire under the boundary line agreement in exchange for its riparian rights and not including the strip dedicated for Stony Island avenue.....	59.668 Acres
Lands lying west of Langley avenue, east of Stony Island avenue, and north of the north line, produced, of the south half of the southeast quarter of the southwest quarter of Section 13-37-14, sometimes referred to as City lands...	21.389 Acres

Total 286.236 Acres

In Article VI providing for accounting, it is assumed that the total expenditure of all dredging and other work to be done by the Company under the agreement is \$600,000. If there is a reduction in cost this will reduce the acreage accruing to the Company, and if the cost is greater the increase is to be paid for by the City either in cash or by the conveyance of additional acreage to the Company. Paragraph (11) of Article VI sets forth that the net advantage to the Company from conveyances, reconveyances and confirmations of lands and rights under this agreement, and

under the boundary line agreement referred to is equivalent to 100 acres of filled land. From figures hereinabove set forth I think this net advantage is considerably greater.

10. Article IX provides as follows:

“All of the work performed or caused to be done hereunder by the Company of dredging said entrance Basin, Anchorage Basin, or slips, and filling lands with the spoil thereof, other than lands of the Company specified in Paragraph (4) of Section 2 of Article V of this agreement, shall be done by the Company as agents for the City, and said City hereby agrees to indemnify and save harmless said Company from any and all costs, damages, or expenses of any nature whatever that may result from the performance of the acts necessary to be performed by the Company as required by this agreement.”

The agency of the Company for the City is also expressed in a recital near the top of page 21.

From a study of the ordinance it would seem that the two agreements therein set forth are quite beneficial to the Company and for that reason I see no reason why the City should agree to indemnify and save harmless the Company in the matters in Article IX set forth.

11. Article X has to do with the dates of performance and the effect of various provisions of the agreement.

Paragraph (1) provides that the execution and delivery of the second agreement shall be simultaneous with the execution and delivery of the boundary line agreement provided for by Section 2 of the ordinance, and Paragraphs (2) and (3) provide for the conveyance of the railroad right of way and additional lands and the harbor lands as set forth in Articles I and II of the agreement, to be effective immediately upon the execution and delivery of this agreement, and upon the approval of the sale by the Director of Public Works and Buildings of the State of Illinois and the affixing of the seal of his department. These provisions for immediate conveyance of the lands by the City to the Company as provided in Articles I and II, I deem to be too favorable to

the Company. Proper reservations should be embodied in the agreement providing that the conveyance of these lands should not take place until after the Company has performed the work of dredging, filling and other work. I see no reason why the Company should be paid its consideration and price before it has performed any of the work. Rather these conveyances should be withheld as a guarantee that the Company will perform the work.

12. Paragraph (6) at the top of page 34 provides that the dredging, filling and other work to be done by the Company, as provided in Article V of the agreement, shall be done within one year after the completion and fulfillment of the following conditions precedent:

(a) The execution and delivery of this agreement and the boundary line agreement.

(b) The execution, delivery and becoming effective of the several conveyances provided for in Paragraphs (2) and (3) of Article X.

(c) The execution and delivery of all further assurances provided for in Paragraph (5) of Article X.

(d) The final establishment and confirmation of the boundary line agreement.

(e) The acquisition by the City of title in and to all lands and rights which it is required to obtain under this agreement.

(f) The confirmation by the Circuit Court of Cook County, Illinois, or any court of final jurisdiction, of all boundary line agreements heretofore or hereafter entered into by the City and owners of riparian lands adjacent or bordering on Lake Calumet, or the acquisition by the City of all necessary rights, lands and property in such riparian lands by condemnation or otherwise.

(g) The approval of this agreement by the Director of Public Works and Buildings of the State of Illinois, the affixing of the seal of the Department of Public Works and Buildings of the State of Illinois, the approval of the Com-

missioner of Public Works of the City and the approval of all other state, federal or municipal authorities who are or may be required by law to approve this agreement, and the approval of the Department of Public Works and Buildings of the State of Illinois, of any changes, if any, in said plan adopted by said ordinance on July 22, 1921, as provided by said department, which may be required in connection with such dredging, filling and other work to be done by the Company. And these seven conditions precedent are followed by other provisos and recitals intended to relieve the Company of its obligation to prosecute the work in question.

It is well understood that the operation of a condition precedent is to prevent effectually the doing of the thing upon which such condition precedent operates. Accordingly, I deem it highly inadvisable to burden this agreement expressly with any of the conditions as above set forth. Some of these conditions precedent will, of course, be done, accomplished or carried out at the proper time. But I see no reason why the dredging, filling and other work should be made to depend upon these conditions by having them expressly written into the contract. Under these various conditions precedent the City might find itself unable to go forward with its great improvement for years to come. As to (c), the execution and delivery of all further assurances provided in Paragraph (5) of Article X, no one can foresee or foretell what the Company might demand in this respect and no one can know if such demand would be reasonable or unreasonable. As to (e), the acquisition by the City of title in and to lands and rights which it is required to obtain under this agreement, it is not known what such lands and rights are unless they are those referred to in Paragraph (f) immediately following. As to these the City is now concluding the litigation for the confirmation of a boundary line agreement entered into with other riparian owners, and as to the obtaining of the various permits referred to in Paragraph (g), these will be obtained as occasion arises, but they should not be made conditions precedent to the Company's doing the dredging, filling and other work provided for in the agreement.

13. It is to be observed that in the introductory recitals of the second agreement there is set forth on pages 10 to 13, inclusive, a statement of the chief provisions of the Harbor Act of 1913, on pages 13 to 14, inclusive, a statement of the chief provisions of the State Land Grant Act of 1921, and on pages 15 to 20, inclusive, a statement of the chief provisions of the Harbor Construction Ordinance of July 22, 1921. These various matters are legislative acts and need not be recited in an agreement of this kind. They rather tend to encumber the agreement, and I therefore recommend that they be omitted.

14. Section 6 of the ordinance, page 38, provides for the repeal of an ordinance passed March 21, 1923, amending the harbor construction ordinance passed July 22, 1921. This amending ordinance passed March 21, 1923, added to the Lake Calumet Harbor lands a tract described as follows:

“That tract of land which is bounded on the north by the north line, produced west, of Lot 35, in Block 21, in Langley’s subdivision of the northeast quarter of the southwest quarter of fractional Section 13; on the east by the west line of the east half of said southwest fractional quarter of said fractional Section 13; on the south by the east and west center line of the southeast quarter of said southwest fractional quarter of said fractional Section 13; and on the west by the east line of the tract of land described in Paragraph (b) last preceding.”

This is a tract of submerged land lying north of the center line of East 112th street, west of the west line of Jeffrey avenue, produced, and east of a line drawn 50 feet east of the permanent boundary line on the east side of the lake and south of the north line of Lot 35 of said Block 21, produced west. This tract is approximately 630 feet in length east and west and 305 feet in width north and south. (Note: There is reason to believe that the above description was intended to read Block 20 instead of Block 21 in Langley’s subdivision.) So far as I can see the reason for adding this tract of land to the Lake Calumet Harbor lands by the amending ordinance passed March 21, 1923, was upon the

theory that the City owned the riparian rights lying west of Jeffrey avenue and that therefore these lands were City lands. If this amending ordinance should be repealed it would seem that its repeal would enure to the benefit of the Company and give it these additional lands.

Respectfully submitted,

JAMES G. SKINNER,
Special Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Compensation for Use of Sub-Sidewalk Space by Northern Trust Company.

November 21, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We are in receipt of your letter concerning compensation for sub-sidewalk space at 162-168 North State street. You ask for advice as to what steps should be taken to obtain settlement of the amount of compensation claimed by the City.

It appears that on October 12, 1905, a permit in the nature of a lease was given by the City to the Northern Trust Company as trustee, its successor in trust or assigns, to maintain a vault underneath the surface of the sidewalk adjacent to the property in question. This contract or permit was for a term of ten years from October 12, 1905, and the compensation was fixed at \$31.10 annually for that period. All of the compensation due under the contract or permit for the entire period was paid, and additional compensation on the same basis was paid up to and including June 30, 1916. This

contract or permit was given and executed under the terms of a general ordinance in force at the time of the execution of the permit or contract. No compensation was paid to the City from June 30, 1916, to October 3, 1923, when a new permit was issued. The fee to the street being vested in the City it has the right to enter into such a contract subject only to the paramount right of the public.

During the term of the permit or contract a new ordinance governing the rental and use of space under sidewalks was passed. This ordinance was passed on January 29, 1912 (see Council Journal 1911-12, pp. 2678-2680), and is in force at the present time. The ordinance of 1912 was amended so as to make some slight change in its provisions. The language of the ordinance is as follows:

“2309. Whenever any party holding a contract or permit for the construction or maintenance of any space, vault or structure, under the sidewalk in any street, alley or other public place of this city, or for the construction or maintenance of any coal hole, trap-door, or other opening in the sidewalk, which shall have been issued under the terms of any ordinance or Council order heretofore in force, the conditions of which have been and are now being fully complied with, shall apply for a permit hereunder and shall desire to have the permit or contract heretofore entered into under such ordinance heretofore in force, cancelled, the Commissioner of Public Works shall cancel the same as regards any liability thereunder arising after the date of the issuance of the new permit hereunder, but such contract or permit and the bond given therewith shall remain in full force and effect as to all rights and liabilities accruing under the same, including all amounts due the City of Chicago for fees or compensation under the same, up to the time of said cancellation, otherwise such contracts and permits shall remain in full force and effect.”

You will note from the language of the ordinance that a specific duty was imposed on the holders of permits or contracts granted under ordinances in effect prior to 1912. The ordinance of 1912 provides that when the holders of permits or contracts of the character described desire to have the

same cancelled they shall make application to the Commissioner of Public Works for such cancellation, under condition that all liability arising under the permit or contract shall be fully discharged by the holders of such contract or permit.

From the facts in the matter under discussion there is nothing tending to show that the holders of this permit or contract ever made any application for the cancellation of their permit or contract, but did make payment for a period of time after their permit or contract expired.

The original contract or permit granted in 1905 required the grantees, at the expiration of the term, to vacate the space under the sidewalk on the order of the Commissioner of Public Works and fill the vault by paving or otherwise as shall be ordered by the Commissioner of Public Works. It appears that after the term of the original permit of 1905 the vault remained in the same condition as it was in during the term of the permit or contract, and that the grantees used the vault during all of the time from June 30, 1916, to October 3, 1923, without paying any compensation to the City for the use of the sub-sidewalk space, but that on October 3, 1923, application was made for a permit under the ordinance of 1912 as amended.

We are of the opinion that even if the contention of the grantees were true that no contract existed, grantees would still be liable for reasonable compensation for use and occupancy of the space so used by them.

It is our contention that the payment covering the period from October 13, 1915, to June 10, 1916, constituted a continuance of the contract under the same conditions as existed during its term. The contract is somewhat analogous to a lease, and such payment was a recognition by the grantees of the right of the City to the compensation fixed by the terms of the original contract, at least for the year from October 13, 1915, to October 13, 1916. In view of the fact that no effort on the part of the grantees was made to cancel the contract or permit from June 30, 1916, to October 3, 1923, the grantees were liable for the compensation covering that

period as it was fixed in the permit or contract. The ordinance provides that all of such contracts shall remain in full force and effect until they are cancelled.

We are therefore of the opinion that the City can collect the amount of compensation due it under the original contract from June 30, 1916, to October 3, 1923.

Yours very truly,

WILLIAM V. DALY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Increase of Salaries of Municipal Court Judges.

November 21, 1924.

HON. ROSS A. WOODHULL, Chairman Committee on Finance.

Dear Sir:

In your letter of recent date you inquired whether the ordinance recently passed by the City Council increasing the salaries of the Chief Justice and the Associate Judges of the Municipal Court is valid. Replying thereto, we beg to advise you that this ordinance, which appears under date of October 31, 1924, at page 3912 of the Council Journal, merely amends a section of The Municipal Code and is a valid ordinance, since it is always within the power of the City Council to fix salaries.

We apprehend that you would like to know in this connection whether the same will take effect with respect to the salaries of the judges elected at the recent election. As to

this, we have made inquiry and find that the ordinance was signed prior to the election and therefore it was in full force and effect before the judges elected on November 4, 1924, were voted on; consequently the salary increase will apply to them. As to other judges, they will not be entitled to increases in their salaries during their present terms of office.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Procedure to Establish Municipal Park or Playground.

November 21, 1924.

HON. FRANK J. TOMCZAK, Alderman, 39th Ward.

Dear Sir:

Answering your inquiry of the 14th inst., with reference to the procedure necessary to be taken for the establishment of a park or playground in your ward, we suggest first that you confer with Mr. Walter Wright, in charge of the Bureau of Parks, Playgrounds and Bathing Beaches, with regard to finding a location best suited for park or playground purposes.

Upon the selection of a site, it will then be necessary to negotiate for its purchase or lease, which will concern the Bureau of Real Estate in the City Comptroller's office. Of course, an appropriation to cover this item will have to receive the approval of the City Comptroller when he submits his estimate of expenditures to the Finance Committee for the

year 1925. Likewise the City Council will have to approve of the Comptroller's estimate by including in the Annual Appropriation Bill for 1925 the sum recommended by him for this improvement.

Yours very truly,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Custody and Responsibility of City Treasurer for Securities Belonging to School Fund.

November 29, 1924.

HON. JOHN A. CERVENKA, City Treasurer.

Dear Sir:

We are in receipt of your letter of recent date in which you inquire whether, as school treasurer, you should act as custodian of securities belonging to the "School Fund Income Account," and whether any responsibility attaches to you on account of the income investments of the Board of Education by reason of the fact that moneys are turned over to you from time to time for the credit of that account by the Secretary and Auditor of the Board of Education without other information than that they are "income from investments."

We do not believe the statute contemplates that any responsibility should attach to the City Treasurer, as *ex officio* school treasurer, for the handling of these securities, or that there would be any liability as to him in case of loss.

Section 134 of the School Act of 1909, as amended by the act relating to the schools of cities of more than 100,000 inhabitants passed in 1917 (Cahill Rev. St. 1923, p. 3092), specifies that investments of school funds shall be made "by the board of education," in certain classes of securities. The remainder of the section is taken up with the auditing of accounts, etc., all to be done by the board of education, and the school treasurer is not even mentioned. From this it would seem that the treasurer has neither duty nor liability with respect to the purchase, handling or safekeeping of these securities.

This view is strengthened by the next section of the statute, which deals with the duties and liabilities of the City Treasurer as school treasurer. (Cahill, pp. 3092-3.) Under Section 135 "all moneys raised by taxation for school purposes, or received from the State Common School Fund, or from any other source for school purposes," are required to be turned over to the treasurer. There are rigid specifications as to keeping and handling, as to accounting, and as to liability, but nowhere in this section is mention made of investments, the subject-matter always being "money" or "moneys."

From this we conclude that the statute plainly intends that the Board of Education shall have the responsibility for the proper investment of the funds and the safekeeping of the investment securities, while the treasurer's responsibility relates to the moneys actually turned over to him.

Very truly yours,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Transfer of Appropriation Within City Department.

December 1, 1924.

HON. JOHN A. CERVENKA, City Treasurer.

Dear Sir: .

Your letter in relation to the making of transfers by the City Council, which you say are for the payment of expenses incurred by department heads in violation of the restrictions in Section 4 of the Annual Appropriation Ordinance, was referred to the writer for consideration and reply. You ask whether the City Treasurer may legally recognize ordinances making such transfers.

Transfers are made in pursuance of the authority or power given by Section 2a, of Article VII of the Cities and Villages Act. Such express authority was necessary to partially overcome the restrictions placed upon the City Council in regard to appropriations which are contained in Section 2. These restrictions are on the making of appropriations, and not on the administrative features of Section 4 of the Annual Appropriation Ordinance.

In so far as the provisions of Section 4 of the ordinance are merely administrative and are not so interwoven with the appropriations as to be an inseparable part of them, these administrative provisions may be changed from time to time by ordinance, the same as any other rule of conduct established by ordinance may be changed. This is true even though Section 2 of the statute above referred to places a limitation on the amendment of the Annual Appropriation Ordinance so that it would not be possible to amend the ordinance itself.

As far as the transfer provision of the statute is concerned, we have always adhered to a liberal interpretation of that, believing that in so doing we are carrying out the intention of the Legislature.

Answering your question therefore in the abstract, as you propounded it, we beg to advise you that unless there are peculiar features or circumstances about an ordinance making a transfer which do not occur to us at this writing, the City Treasurer would be justified in recognizing such transfers as long as they are made by drawing from one or more of the appropriations and adding to another or others within the same department of the City government.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Fireman Must Serve Last Five Years Continuously to be Retired on Pension.

December 2, 1924.

HON. EDWARD J. BUCKLEY, Fire Marshal.

Dear Sir:

Replying to your letter of November 26, 1924, requesting an opinion as to the right of Hubert A. Harnois to a pension, I submit the following:

Section 8 of "An Act to provide for a Firemen's Pension Fund," etc., filed June 14, 1917, provides that any fireman seeking to be retired on a pension following twenty years of service, must have served the last five years continuously to be entitled to the benefit of the pension act.

By the statement of facts relative to Hubert A. Harnois, fireman, Engine Co. 97, as set out in your letter, Mr. Harnois will not have completed five years of con-

tinuous service since his reinstatement in the department until July 22, 1925.

I am of the opinion that Hubert A. Harnois, under the circumstances stated, is not entitled to be retired on pension at the present time.

I am returning herewith the application which accompanied your letter.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Whether Automatic Pistol Machine is Gambling Device or Game of Skill.

December 3, 1924.

HON. MATTHEW ZIMMER, Acting Superintendent of Police.

Dear Sir:

You have requested an opinion relative to whether a certain device for testing automatic target skill is a gambling device.

From the descriptive circular which you have transmitted to us, it appears that the machine operates as follows: A small movable pistol is suspended at one end of the device. When a penny or nickel, depending upon the type of machine, is inserted, the pistol is automatically loaded with five steel balls. At the very end of the device are five slots num-

bered, respectively, 5, 10, 15, 20 and 25. The purpose of the operator is to hit the various targets, the target marked No. 5 being easier to hit than that marked No. 10, etc. There is an automatic adding device which registers the total score which is made.

According to the descriptive circular, this device is purely a device of skill. The operator knows beforehand that if he is able to hit target No. 5, he will receive five points. There is no chance which enters into the operation of the machine. The score obtained by the operator depends entirely upon his skill in shooting the pistol.

It is true that in all of the devices which are purely a test of skill, it is always possible to alter the same and modify them in such a way that an element of chance enters into their operation, and they thereby become gambling machines. If it were so altered, then this device would be a gambling machine.

We have not had an opportunity of examining the machine itself, but if the facts alleged by the circular are correct, and if the machine is operated strictly according to the description given by the circular, and without any further changes or modifications, then this machine is not a gambling device, but is merely a device to test skill, and, as such, is not prohibited by any ordinance or statute. The giving of a prize for the best score does not make any difference.

A similar opinion was rendered by this office on December 12, 1923, relative to a coin-shooting pistol.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Contract With City to Lay Sewer—What Constitutes
Extension of Time by Implication—Damages
Against City—Payment of Judgment by City.**

December 4, 1924.

ALD. JOSEPH O. KOSTNER, Chairman, Committee on Local
Industries, Streets and Alleys.

Dear Sir:

Your letter of November 28th, addressed to the Corporation Counsel has been referred to this office for reply.

We shall discuss the questions urged by you and state our conclusions with reference thereto in the order in which they are set forth in your letter.

A.

The original contract between the City of Chicago and The White Construction Company contains a clause which stipulates the time within which the work must be commenced and the time of the completion thereof, but contains the following proviso:

“Provided, however, that if the time of the performance of the contract herein be for any reason, either expressly or by implication, extended, such extension shall not affect the validity of this contract.”

The records of the Board of Local Improvements show that prior to the award of the contract to The White Construction Company and its execution by that company, the Board of Local Improvements ordered a supplemental assessment. On October 13, 1922, one day before the contract was awarded, a public hearing was held and after considering the argument and objections of the property owners, the Board decided to proceed with the work and on November 22d recommended an ordinance for a supplemental assessment to the City Council.

Now, The White Construction Company knew, as a matter of law or was charged with knowledge of the fact, that property owners may file a remonstrance petition within thirty (30) days from the date of the public hearing, and upon the filing of such petition signed by the owners of a majority of the frontage on the line of the proposed improvement all proceedings are automatically stayed for the period of one year. Hence, The White Construction Company could not be required to begin work on a contract where there was a deficiency of several hundred thousand dollars between the amount of the roll and the contract price during the thirty (30) day period within which the owners of a majority of the frontage were permitted to file a petition of remonstrance. And such remonstrance petition having been filed within the thirty (30) day period, The White Construction Company, by a parity of reasoning, were not obligated to enter upon the performance of a contract until the expiration of the year from the date said petition was filed.

It appears further that upon the report of the committee to which the ordinance for the supplemental assessment was referred, the same was placed on file and up to the present writing this ordinance has never been adopted by the City Council, and consequently no provision has ever been made for the payment of the price named in the contract of The White Construction Company.

In view of the circumstances hereinabove enumerated, it is our opinion that the time of commencement and the time of performance of the work, as fixed by the terms of the contract, have been extended by implication; that The White Construction Company is not in default in complying with the requirements of said contract; that the contract is a valid and binding obligation of the City of Chicago and that the contractor may avail itself of any proper legal remedy for the enforcement of the same.

B.

It follows, from the conclusion reached by us on the first question submitted by you, that The White Construction Company might properly sue the City of Chicago for damages for breach of contract. It would not be necessary for the contractor to commence or to complete the work as a condition precedent to the institution and maintenance of such an action. A *prima facie* case would be made out by proving the amount of the damages, by showing that the contractor was at all times ready, able and willing to perform its contract and that it was prevented from so doing by the acts or conduct of the City.

C.

In the event The White Construction Company recovered a judgment for damages against the City of Chicago, such damages would be payable out of the fund provided or appropriated for the payment of judgments. In the event this fund is exhausted or there are no moneys in it available for the payment of judgments, a judgment creditor could mandamus the City to include in its tax levy a sum sufficient to pay the outstanding judgments of the City.

We trust this supplementary opinion may be of some benefit to you in your consideration of the questions connected with this transaction.

Very truly yours,

THOMAS A. SHEEHAN,
Attorney, Board of Local Improvements.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Sale of Cigarettes Near School When Business Was
Located at Premises Before Erection of School.**

December 6, 1924.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

We are in receipt of your letter in which you inquire whether the ordinance prohibiting the sale of cigarettes within three hundred feet of a school applies to establishments that were at their present location prior to the time a school was located within the proscribed distance.

The question of priority does not seem to be involved. There is no provision in the ordinance which excludes places located previous to the building of the school from the requirement in question, and it is doubtful whether an ordinance so framed would stand the test of validity.

The leading case on the subject of cigarette licenses is *Gundling v. City of Chicago*, 176 Ill. 340. In this case the ordinance prohibited sales of cigarettes within 200 feet of a school house. This provision is specifically mentioned in the decision upholding the ordinance. The case was later reviewed by the U. S. Supreme Court (177 U. S. 183), which held that the ordinance was not in violation of the Federal Constitution or statutes. In this reviewing decision the entire ordinance is set out. It follows, therefore, that while there was no specific ruling on this particular provision, both of these courts of last resort have in fact sanctioned the feature of the law which you have asked about.

Since this appears to be a valid and enforceable provision, it may be enforced against a party who is located within the prohibited district, no matter when he first moved there. In *Standard Oil Co. v. City of Danville*, 199 Ill. 50, it was held that there was no vested right to store oil in tanks in greater quantities than was permitted by ordinance in

residential districts merely because the tanks were located there first. And again, in *People ex rel. Roos v. Kaul*, 302 Ill. 317, a clause in a statute was held unconstitutional because it had a proviso that exempted buildings already erected from the requirement preceding it.

We are therefore of the opinion that this provision is enforceable in all cases, regardless of the time when the dealer in cigarettes located his business in the neighborhood.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Legal Rights of Santa Fe R. R. in City Streets—Doctrine of Equitable Estoppel.

December 8, 1924.

HON. HENRY L. FICK, Chairman, Sub-Committee of Committee on Local Industries.

Dear Sir:

In your letter to the Corporation Counsel dated November 29, 1924, you write as follows:

“Will you kindly render an opinion, as early as possible, to the subcommittee appointed by the Committee on Local Industries, Streets and Alleys on the so-called Santa Fe ordinance as to the legal rights of the Santa Fe Railroad Company in and to all the property occupied by said railroad within the limits of the City of Chicago?”

“Mr. Monahan of the Bureau of Surveys has plats showing lands occupied.”

Your letter has been referred to the undersigned for consideration and reply.

The lines of the Atchison, Topeka & Santa Fe Railway Company enter the City of Chicago between the Illinois and Michigan Canal and the Sanitary District channel at Cicero avenue and lead thence to its main passenger station at Polk and Dearborn streets. In addition to the property within the City of Chicago owned or leased by said company, it occupies portions of various public streets and alleys, some of which have not been vacated. We understand that it is to this occupancy that your inquiry refers.

The express authority from the City of Chicago under which in certain cases the railway company claims the right of occupation and to which reference is made on the face of the folios of your survey, consists of an ordinance of the City Council and certain permits issued by the Commissioner of Public Works.

The ordinance in question is entitled "An Ordinance Granting Permission and Authority to the Atchison, Topeka & Santa Fe Railroad Company in Chicago to construct and maintain a railroad," (passed Aug. 1, 1887; accepted Aug. 9, 1887; accepted Aug. 26, 1887).

This ordinance (Sec. 1) authorizes the company, its lessees and successors, to construct, maintain and operate a railroad "with one or more railroad tracks, with the necessary and convenient side tracks, turnouts, switches and appurtenances," over and upon lands then owned or thereafter acquired along a route specifically described.

Section 5 of said ordinance authorized the Company to "cross at grade any and all intervening streets and alleys along the line of said routes." This section also provided that the Company was to be subject to the supervision of the Department of Public Works in and about the construction of its tracks.

There is no provision in the ordinance to the effect that the right to cross streets with tracks constructed pursuant to

the ordinance and under supervision of the Commissioner of Public Works might be revoked.

Said ordinance also contains no provision as to the issuance of permits, but Section 592 of the Municipal Code of Chicago, 1881, in force when the tracks were constructed, and an ordinance passed December 7, 1885 (Municipal Code of Chicago, 1887, Supplement, p. 65), provided that the Commissioner of Public Works should issue permit in accordance with the terms of any ordinance granting the right to lay tracks.

Permits were issued for all tracks enumerated in paragraph 5 to 12 of Appendix II, and shown in green on folio 135 (Appendix I), and in paragraph 18 of Appendix II, also shown in green on folio 140 (Appendix I).

The permits in question are as follows:

No. 1 Document No. 530, Department of Public Works, filed April 18, 1888.

No. 2 Document No. 529, Department of Public Works, filed April 2, 1888.

No. 3 Document No. 548, Department of Public Works, filed June 20, 1888.

No. 4 Document No. 663, Department of Public Works, filed April 13, 1889.

These permits are substantially alike in form. It will be sufficient to set out in full one of them, which will be found in paragraph 14 of Appendix II. The streets and alleys to which they relate are shown in connection with the identification of the permit on the folios of your survey and will be found in Appendix I.

The Atchison, Topeka & Santa Fe Railway Company is the successor of the "Atchison, Topeka & Santa Fe Railroad Company in Chicago"; the latter road is designated in the aforesaid ordinance of 1887.

For the convenience of discussion we have grouped the properties here considered under two headings: first, city

streets or alleys occupied without council authority; second, city streets or alleys occupied under council authority, concerning which the question of compensation has been raised.

I.

STREETS OR ALLEYS OCCUPIED WITHOUT COUNCIL AUTHORITY.

See Appendix II, paragraphs (1) to (4).

While the Statute of Limitations cannot run against a municipality in matters, such as control of the streets, which are public in their nature, yet the doctrine of equitable estoppel can be raised to preclude the City from disturbing the occupants of said streets where

(a) —there has been a long, open, adverse and continuous use of the land claimed as a street by a private occupant in connection with his abutting property, and

(b) —where he has made improvements upon the said property (including the street), which improvements are valuable in and of themselves or because they are used as a part of and in connection with other improvements on the owner's property abutting the street; and particularly in cases where to remove the improvement from the street would seriously damage the owner and would be only of theoretical benefit to the public.

City of Chicago v. Union Stockyards & Transit Co.,
164 Ill. 224.

Illinois Steel Co. v. City of Chicago, 229 Ill. 303.

C., R. I. & P. R. R. v. Joliet, 79 Ill. 25.

C. & N. W. Ry. Co. v. Elgin, 91 Ill. 251.

Village of Auburn v. Goodwin, 128 Ill. 57.

Jordan v. City of Chenoa, 166 Ill. 531.

City of Carlinville v. Castle, 177 Ill. 105.

Village of Itasca v. Schroeder, 182 Ill. 192.

The People v. City of Rock Island, 215 Ill. 488.

Reichert Milling Co. v. Village of Freeburg, 217
Ill. 384.

City of Peoria v. Central National Bank, 224 Ill.
43.

From the facts set forth in the appendices it appears that all the improvements of said Company which occupy city streets and alleys therein mentioned without Council authority, have been on said streets or alleys for a long period of time; that to remove them would damage the railroad company and that if they were removed the public would not use said portions of streets or alleys.

We are therefore of the opinion that under the cases above cited, a court of equity would restrain any attempt to remove such improvements.

II.

CITY STREETS OR ALLEYS OCCUPIED UNDER COUNCIL AUTHORITY,
CONCERNING WHICH THE QUESTION OF COMPENSA-
TION HAS BEEN RAISED.

Inasmuch as the Commissioner of Public Works was only authorized to issue a permit to the Railroad Company in accordance with the terms of the ordinance of 1887, and since that ordinance did not provide that it might be revoked at any time or for any reason, the insertion by the Commissioner of Public Works in the permit, of a provision that it might be revoked at any time for cause, was without legal effect, at least after the time when the work was completed under the supervision of the Commissioner of Public Works.

It is probable that during the period of construction, the Commissioner, in the event the Railroad Company failed to follow his proper directions, might have revoked the permit, but inasmuch as he did not do so, and since the tracks were laid down and constructed under his supervision and presumably to his satisfaction, it would not be possible at this time by attempting to revoke either ordinance or permits, to oust the Company from the streets across which its tracks run, particularly since said tracks have been in

constant use from that time until the present without any action on the part of the city.

Attempts have been made to oust railroad companies by revoking similar ordinances, but the Supreme Court of the United States has held in numerous cases that the same may not be done.

Leading cases on this point are *Grand Trunk Western Railway v. City of South Bend*, 227 U. S. 544; *City of Owensboro v. Cumberland Telephone and Telegraph Company*, 230 U. S. 58.

In the ordinance considered by the court in the last mentioned case, there was a reservation by the City of the right to alter or amend the ordinance as the necessities of the City might demand.

But the court held that such reservation was simply one of police control incident to the unabridgable police power and did not reserve a right to revoke the ordinance itself.

There is no reservation in the Santa Fe ordinance of 1887 that the City may amend or alter the same. The ordinance does provide that said company shall operate its trains "over and along said tracks" subject to all laws and ordinances relating to railroad companies generally then in force or thereafter passed; this, however, does not authorize revocation.

The rights acquired by railroad companies under ordinances in Illinois are well stated by the Circuit Court of Appeals for the 7th Circuit in *City of Chicago v. N. Y. C. Ry. Co.*, 216 Fed. 735, 738, as follows:

"Under Illinois law a railroad company has authority to locate its right of way, including a way upon or across streets, without consulting the city. That authority flows from the sovereign. The only limitation is that construction of the railroad upon or across a street shall not be undertaken without the assent of the city. When the city assents, the property right be-

comes as completely vested as if the grant had been directly from the sovereign.”

(See also *City of Chicago v. Union Stockyards & Transit Co.*, 164 Ill. 224.)

We are therefore of the opinion that the tracks above referred to in this heading are lawfully in place and may not be removed by the City.

With reference to embankments on streets and alleys between Western avenue and Rockwell street, shown on folio 140, Appendix I, it appears that the tracks were laid under permit from the Commissioner of Public Works and that the work of laying the same upon said embankments across and upon said streets and alleys was done with his knowledge and under his supervision. They have remained thereon for over thirty years, without any action being taken by the City, and under the authorities above cited we are of the opinion that the City could not successfully defend against injunction proceedings by the railway company if the City attempted to remove the embankments at this time; particularly since as shown by the facts recited in paragraphs 20 and 22 of Appendix II, the portions of the streets in question would be wholly inaccessible to the public if the embankments were removed, except the stub end portion of West 32d street which leads from Western avenue to unoccupied property belonging to the Sanitary District and lying between its channel and the Santa Fe tracks.

Respectfully submitted,

EUGENE H. DUPEE,

ROY S. GASKILL,

GEORGE F. HURLEY,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Interpretation of New Fire Department Ordinance—
Disability of Firemen—Retirement at Age of 60
—Rewards—Temporary Appointments.**

December 9, 1924.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

You have requested the Corporation Counsel for an opinion relative to certain questions which have arisen under the amended Fire Department Ordinance, and concerning the procedure to be followed in the case of temporary appointments.

Sections 1199 and 1200 of the amended Fire Department Ordinance provide as follows:

“1199. Disability—Salary.) Any member of the fire department receiving any injury or becoming disabled while in the discharge of his duties and by reason of or as a consequence of the performance of such duties, so as to prevent him from attending to his duties as such member of the fire department, shall for the space of twelve months, provided his disability shall last that time, or for such portion of twelve months as such disability shall continue, receive his usual salary.

1200. Evidence of Disability.) The fact of the existence of such disability and its duration shall be certified to by the city physician or by the production of such other evidence as shall be satisfactory to the fire commissioner, provided, however, that no member of the fire department who is on the pension roll or who is receiving any benefit from the pension fund by reason of any such disability or injury shall be entitled to receive any part of his salary during such time as he shall remain on such pension roll or receive any benefit from such pension fund.”

You have requested an opinion relative to the validity of the aforequoted sections.

The substance of these sections of the ordinance is that when a member of the Fire Department becomes disabled while in the discharge of his duties so as to prevent him from attending to his duties, he should be paid his regular salary for the space of twelve months or so long as the disability shall continue.

It is provided, however, by Section 9 of "An act to provide for a Firemen's Pension Fund and to create a Board of Trustees to administer said funds in cities having a population exceeding 200,000 inhabitants," as follows:

"If any fireman of any such city while in active service or on leave of absence shall become and be so physically or mentally disabled as to render necessary his retirement from active service, said board shall order the retirement of such disabled fireman and he shall be paid a monthly pension equal to one-half the amount of salary attached to the rank which he may have held in such fire service at the date of his retirement; *Provided, further*, that the pensions so paid shall not exceed the sum of three thousand (\$3,000.00) dollars per annum, nor be in any case less than six hundred (\$600.00) dollars per annum. *Provided, however*, that no pension shall be allowed to any fireman who has been so physically or mentally disabled while on leave of absence without pay for more than thirty days during any year.

If, after placing a fireman on the pension roll, the board shall become satisfied that such retired fireman has recovered from such physical or mental disability, said board shall order the suspension of the payment of his pension and that said fireman report back to the marshal or chief of the fire department of such city, who shall thereupon order the reinstatement of such fireman in active service in the same rank or grade that such fireman held at the time of his retirement."

It will be observed that there is an apparent conflict between the aforequoted sections of the Firemen's Pension Fund Act which provide that a fireman shall be retired when he becomes disabled, and Sections 1199 and 1200 of the ordinance which provide that he shall not be retired until a period of twelve months has elapsed from the date of the disability. It is our suggestion that the ordinance should be amended

in such a way as to avoid this conflict. We do not believe that it is the intention of the statute to require that a fireman should be retired if he is disabled for a very short period of time, or for a short period the time of which can be ascertained. To place such a construction on the statute would mean that when a fireman acquired a contagious disease, or was laid up for a week or so with a minor ailment, he would have to be retired and placed on the pension roll. It is obvious that this interpretation would be impossible of enforcement as a practical matter in the administration of the Fire Department. It is our belief that the statute means that a fireman should be retired when he is so incapacitated as to be unable to perform the duties of his office and when he is *permanently* incapacitated. We therefore recommend that the ordinance be amended to provide that:

When a fireman is so disabled as to be unable to perform the duties of his office, and when such disability is permanent, he shall immediately be retired and shall draw pension. When a fireman is so incapacitated as to be unable to perform the duties of his office but when such incapacity is not permanent, he may be retained and may continue to draw his usual salary for a period not to exceed six months in the discretion of the Fire Commissioner. The fact of the existence of the disability and the question of whether it is permanent or temporary, should be decided by the City Physician upon examination.

You have also requested this Department to advise you as to the validity of Section 1202 of the amended Fire Department Ordinance, which provides as follows:

“1202. Retirement of Uniformed Members of Department.) Any member of the uniformed service in the fire department, who shall have attained the age of sixty years shall be retired from such service unless he shall make application to the fire commissioner for retention in such service. Upon the filing of such application he shall subject himself to a physical test as prescribed by the rules and regulations of the fire department. In the event that said applicant successfully passes such test, he may be retained in such service for

a further period of two years, after which he shall be peremptorily retired; Provided, however, that the provisions of this section shall not become effective until December 31, 1924."

Section 12 of "An Act to regulate the civil service in cities," provides in part as follows:

"Section 12. Removals.) No officer or employee in the classified civil service of any city, who shall have been appointed under said rules and after said examination shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before said civil service commission, or by or before some officer or board appointed by said commission, to conduct such investigation."

It is very doubtful whether the City Council has any power at all to provide for the removal of civil service employes. According to Section 12 of the above quoted Civil Service Act, no employe may be removed except upon examination by the Civil Service Commission, and for cause. In this connection, the language of the Supreme Court is significant in the case of *People v. Coffin*, 282 Ill. 599, at page 610:

"The employes of the commission being city employes, it was the right of the city to create or authorize them, as well as its duty to appropriate the necessary money to pay such employes, *but the manner of their employment and their discharge, as well as their examination, and certification for employment, is regulated by the Civil Service Law and in the same manner as that of all other city employes.* The Civil Service Law is necessarily a part of the contract of employment of every civil service employe, *and such an employe can only be discharged in the manner provided by Section 12 of said act.*"

In the case of *People v. Stevenson*, 270 Ill. 569, the Supreme Court, at page 572, said:

"All (state civil service employes) are secured in their positions by a prohibition against removal except upon written charges and a hearing with an opportunity to defend against charges. * * * They (the pro-

visions of the act) give no warrant for disregarding the plain provision of the statute that no employe in the classified service shall be discharged except upon written charges, with an opportunity to appear and defend."

While the validity of the ordinance providing for automatic removal of every employe of the Fire Department at the age of sixty is very doubtful in the face of the above authorities, nevertheless we are of the opinion that the same results could be obtained by amending the ordinance to provide for a mental and physical examination of all members of the Department who reach the age of sixty years and a similar examination every year thereafter, and a provision that whenever a member of the Department does not pass said examination, the Fire Commissioner may then notify the Civil Service Commission that said employe is physically or mentally unable to perform the duties of his office. The employe may then be removed according to law by the Civil Service Commission.

Section 1204 of the amended ordinance provides as follows:

"1204. Rewards.) The fire commissioner for meritorious services rendered by any member of the fire department in due discharge of his duty, may permit any member of the said department to retain for his own benefit any reward or present tendered him therefor upon being notified thereof prior to its receipt; and it shall be cause of removal for any such member to receive any reward or present, without notice thereof to the fire commissioner and without his permission."

It is provided in Section 2 (d) of the Firemen's Pension Fund Act that:

"Said pension fund shall consist of * * * all rewards in moneys, fees, gifts and emoluments that may be paid or given for or on account of extraordinary services by the fire department or any member thereof (except when allowed to be retained by competitive award)."

It is our opinion that Section 1204, in so far as it provides that such rewards may be retained by the member receiv-

ing the same with the permission of the fire commissioner, is invalid. All such rewards *must* be paid into the Firemen's Pension Fund according to the aforequoted provisions of the Firemen's Pension Fund Act.

You have also requested that the Corporation Counsel outline the procedure to be followed in case of absence of officers and temporary appointments to duty of inferior officers. The last sentence of Section 10 of the Civil Service Act provides, "To prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department or office may, with the approval of the commission, make a temporary appointment to remain in force not exceeding sixty days, and only until regular appointments under the provisions of this Act can be made."

The provisions of the Civil Service rules relating to temporary appointments are as follows:

"Section 6. When it is necessary to make temporary appointments, appointing officer shall request and receive written notice of approval of same from the Commission before persons are so employed. In cases of bona fide emergency where the appointing officer can show the necessity for immediate appointment, same may be made subject to the approval of the Commission."

We therefore advise you that whenever an office becomes vacant, you may make a temporary appointment for a period not to exceed sixty days, after notice has been given the Civil Service Commission and their approval has been received. However, in case of a bona fide emergency, you have the right to make the appointment immediately and then notify the Commission. In all such cases the temporary appointee is entitled to the lowest salary in the group to which he is appointed. That is to say, if a lieutenant be temporarily appointed to fill the position of captain and if there are different salary groups for captains, then the lieutenant should receive the salary of the lowest paid captain. In case the temporary appointee is filling a position which is still occupied by some other member of the department, who is on leave of absence or who is ill, then the temporary ap-

pointee is not entitled to receive the salary of the major position, for the salary may not be paid twice.

You have also asked whether in case of temporary appointment to fill a vacancy it is necessary to advance all the inferior employes in the line of command to the next major office. The answer to this question is largely a matter of policy to be determined by you. If there are a number of important offices below the office to be filled and if you feel it is necessary to fill these offices by temporary appointment, of course you have the power to do so. On the other hand, since the purpose of temporary appointment is simply to prevent the stoppage of public business in emergencies until regular appointment can be made, it may not be necessary to make such appointments. We also call to your attention the fact that since you have full and plenary powers over all members of your Department, we see no reason why you should not order an assistant fireman temporarily to perform the duties of a fireman and in similar instances without making any formal appointment.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Whether Promotional Examination May be Taken by
Civil Service Employee Who Has Not Served Any
Period of Time in Lower Grade.**

December 9, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Your recent communication calls attention to a certain ruling of the Civil Service Commission, particularly as such

ruling affects the Division of Engineers of your Department. You state that the rule "seems to be a mis-application of the full spirit of the Civil Service Law as pertaining to promotions." And as to the operation of the rule your statement and contention are as follows:

"The Civil Service Commission, through its Secretary, has ruled that eligibility of applicants for promotional rights in taking examinations for a higher grade will be admitted if applicant has been certified in the next lower grade and also that such certification need not have existed for any definite period of time. This makes it possible for applicants to advance one or more grades by virtue of passing examinations and being certified in a grade, but not necessarily rendering any period of service in such grade, although that is the grade from which they are assumed to be promoted."

In compliance with your request we are submitting our opinion in reference to the matter as here presented.

In the complete and proper construction of the Civil Service Act, the Rules of the Commission made pursuant thereto, and the administration of both, the spirit as well as the letter of such act and rules must be taken into consideration. The cardinal rule of statutory construction must first be applied here as in the cases of statutes generally, and that is the legislative intent must be ascertained and carried out. The Supreme Court, in speaking of the subject-matter of promotion in the public service under civil service administration has said:

"The object of the law is to provide for appointment to office upon the basis of merit and fitness, as ascertained by competitive examinations which are open and free to all. * * * In addition to this the act contemplates that promotions shall be made from one grade of the civil service to another upon the basis of ascertained merit and seniority in service and examination * * *. Thus the intention of the legislature in passing the act (Civil Service) to make both original appointments and subsequent promotions depend upon merit, and upon merit as ascertained by examinations, will be defeated. It is well settled, that courts will construe an act of the legislature, so as to give effect

to the plain intention of the body, as embodied in the act (*Soby v. People*, 134 Ill. 66). In so far as the administration of the Civil Service Act is dependent upon the action of the judicial department, 'it is entitled to, and doubtless will, receive a fair and liberal construction, not only according to its letter, but its true spirit and the general purpose of its enactment' (*People v. Roberts*, 148 N. Y. 360).''

The People v. Kipley, 171 Ill. p. 82.

In another case the Supreme Court has said:

"In construing the law or rules made to carry out its provisions certain considerations which led to its adoption must be kept in view. The first and most important object to be accomplished by a system of civil service is to increase the efficiency of the service. This is a worthy purpose and one that appeals to the good sense and sober judgment of thoughtful men. To accomplish this great purpose the Civil Service law seeks to remove the service to which it applies from the domain of party politics and re-adjust it on a common-sense, business basis, placing before the officer or employe every possible inducement to render faithful and conscientious service. Among the means devised to secure the highest degree of efficiency are the assurance that the employe is not in danger of being swept from his place by an unfavorable turn of the political wind, and that faithful, honest and efficient service in one position will open up possibilities for future promotion to a better one. The success of the system, in the nature of things, rests primarily with the persons charged with its administration. So long as the administrative agents are making an honest effort to carry out the provisions of the law in its true spirit they should be left free to exercise a reasonable discretion in all matters depending on information of details and local conditions."

The People v. Errant, 229 Ill. 56, 61.

With these established principles of construction as applied to the Civil Service Act in mind, we may take up for consideration Sec. 9 of that act (Cahill's Ill. R. S., 1923, par. 693 ch. 24), the particular construction of which must determine the issue raised by your communication. Section 9 provides as follows:

“Promotions.) The commission shall, by its rules provide for promotions in such classified service, *on the basis of ascertained merit and seniority in service and examination*, and shall provide, in all cases where it is practicable, that vacancies shall be filled by promotion. *All examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examination*; and it shall be the duty of the commission to submit to the appointing power the names of not more than three applicants for each promotion having the highest rating. The method of the examination and the rules governing the same, and the method of certifying shall be the same as provided for applicants for original appointment.”

It will at once be observed that the letter of the law itself prescribes two essential elements for eligibility to promotion, namely: merit AND service. Sec. 9 enjoins upon the Commission the duty to “provide for promotions * * *, *on the basis of ascertained merit AND seniority in service.*” Therefore one who at the time of such promotional examination is not actually engaged in the service of the grade or rank from which promotion is to be made is not eligible to take such promotional examination. Mere certification of one to such rank is not sufficient.

Not only is this in accord with the plain letter of the law as we construe it, but it is also in perfect harmony with the spirit of the act as indicated by the Supreme Court in language last above quoted (*People v. Errant*), to-wit:

“The first and most important object to be accomplished by a system of civil service is to increase the efficiency of the service. * * * Among the means devised to secure the highest degree of efficiency are the assurance that * * * *faithful, honest and efficient service in one position will open up possibilities for future promotion to a better one.*”

Since actual “service” in the rank is essential to one’s right to promotion to the next higher rank, it is obvious from the letter of the law that certification which is not followed “by the appointment of the person certified” (Act, Sec. 10), and his subsequent service in that rank, will not confer either

legal right *or* qualification on an applicant to take examination for promotion from such rank. It is not possible for the Civil Service Commission by any rule of its own to abrogate, modify or extend in any particular the letter and spirit of the Civil Service act itself.

People ex rel. Kearney, 164 N. Y. 64; 58 N. E. 14.

A rule of the Commission, or any interpretation of the act or rule which, as you declare,

“Make it possible for applicants to advance one or more grades by virtue of passing examinations and being certified in a grade, but not necessarily rendering any period of service in such grade”

is clearly illegal and invalid.

Sec. 9, *supra*, also provides that

“All examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examination.”

This necessarily means “members of the next lower rank” *actually engaged in the service*, of such rank, and not persons whose names merely appear on the “Registers” (Sec. 8 of Act) as having qualified for appointment to such rank, but who have not been certified and appointed thereto and have not been engaged in its service. For instance, said Section 9 provides that:

“it shall be the duty of the commission to submit to the appointing power the names of not more than three applicants for each promotion having the highest rating.”

Only one of the three thus certified will be appointed and enter the service of the higher rank, and he alone would become eligible to take a subsequent examination for promotion from such higher rank, the other applicants, notwithstanding their eligibility to the rank attained by the appointee and their actual certification along with the appointee will not be eligible to take such examination for promotion from the rank to which they have not been appointed and in which they have not served.

We are also inclined to the opinion that original appointment to the civil service under Section 10 of the act, which provides that such "appointment shall be on probation for a period to be fixed by said (commission's) rules (six months by Sec. 5 of Rule IV), will not make one so certified, appointed and serving during such probation period, eligible to promotion to a higher rank of service. For said Section 10 also provides that

"At or before the expiration of the period of probation, the head of the department or office in which a candidate is employed may, by and with the consent of said commission, discharge him, upon assigning in writing his reason therefor to said commission. If he is not then discharged, his appointment shall be deemed complete."

Thus is the probationer's appointment to the civil service not complete until the period of probation has expired. The appointee cannot be regarded as in the civil service before that time. Indeed, "probation," as defined by the lexicographers, is a period of trial, time to determine qualification for service on appointment.

Bouvier's Law Dict., Vol. II, 764.

Century Dict., Vol. IV, 728.

If the appointee should be permitted to take a promotional examination and thereafter should be discharged under the provision of Section 10, there would then exist the anomalous situation of an applicant having taken an examination for promotion to a higher rank in the civil service who in fact has not even attained the status of an original appointee in the service.

So it is that whenever we depart from the test as prescribed by Sec. 9 of the Civil Service Act for determining eligibility to promotional examinations, namely: merit AND service in the rank from which promotion is sought, we invite only conflict, confusion and inconsistency, and at the same time do violence to the letter and the spirit of the law.

Thus far we have given consideration only to the provisions of the law itself, which, of course must govern the

commission in the adoption and interpretation of the rules made pursuant to Sec. 4 thereof,

“rules to carry out the purposes of this act, and for examinations, appointments and removals in accordance with its provisions” (with power to change such rules).

Rule V of the Commission (Report, 1920—relating to “promotion”) provides in Sec. 2 that:

“Promotion examination shall be held when the next lower rank, whether in the same or a lower grade, as determined by the commission, contains two or more eligible persons desirous of taking examinations. Should not more than one eligible candidate register, or should all candidates fail to pass, an original entrance examination shall then be held. No person shall be eligible for promotion from a position in any rank or grade to fill a vacancy in the next higher rank unless the position in which he is employed at the time of examination is in the same branch and class of service as the position to be filled and unless such person is at the time of examination actually employed in such branch and class, or is on leave of absence or is eligible for reinstatement.”

And Section 3 provides that

“Credit for seniority shall be given only for actual service in the rank or grade from which promotion is sought, whether such service has been continuous or not.”

We observe no conflict between these provisions of Rule V and the Civil Service Act. Provision is made for promotion from rank to rank of those only who are actually employed in the rank, and credit for seniority is given “only for actual service in the rank from which promotion is sought.”

The Supreme Court has construed and approved this rule on promotion in the form in which it existed at that time. The rule as there stated and the court’s construction thereof are as follows:

“ ‘Promotions in the classified service shall be based on ascertained merit and seniority of service, and shall

be from rank to rank or grade to grade (except as otherwise provided in this rule) in the same line or character of work to be determined by the commission, and shall be made upon voluntary competitive examination.'

Under this rule, classification for promotion must be from rank to rank, except as otherwise provided, *in the same line of service*. The requirement that the promotion is to be in the same line of employment rests on the rational basis that careful and studious attention to the duties of one station or place has an educational tendency to prepare one for advancement to a higher position in the same line. In our opinion the proper construction of these rules is that promotion shall be made upward—that is, toward the higher salaried place from the grade next below in the same line of employment,—and that the same line of employment means those positions in the various departments the duties of which are so related to the duties of the higher place that a thorough knowledge of them is in a degree preparatory for the duties of the higher position."

We believe that from all the foregoing it is obvious that if such a ruling as you say exists, by which applicants are permitted to pass promotional examinations from grade to grade without service in the lower grade, the ruling does violence to the commission's own established rules as well as to the law.

However, in addition to questioning what is said to be the ruling of the commission on eligibility to take promotional examinations you state what you yourself consider should be made the rule. Your statement follows:

"It is contended that the spirit of the Civil Service Law implies that promotion from one grade of the service to a higher grade thereof, is available only to employes who have served a sufficient period of time in the lower grade to establish a record meriting advancement."

This is a statement of what, in your opinion, the law ought to provide as the proper test for eligibility of civil service employes to seek promotion rather than a statement of what the spirit of the present law is in relation to such eligibility. However strongly your contention ought to ap-

peal to the legislature for an amendment that would incorporate in the Civil Service Act your suggested test for eligibility to promotion, it is not legally possible to permit in the name of the spirit of a law any construction that is in conflict with the plain and unmistakable language of the law itself. The intention of the legislature as expressed in the language used, taken according to its ordinary meaning and common acceptance, must control and be carried into effect. This is an elementary rule of law applied to statutory construction.

The test of eligibility to try for promotion in the civil service is thus plainly stated in Section 9 of the Civil Service Act as follows:

“All examinations for promotion *shall* be competitive among such members of the next lower rank as desire to submit themselves to such examinations.”

The right here given to every member of the next lower rank (actually engaged therein as already defined), is given in language so plain and unequivocal as to permit of no possible construction that would in any degree limit or circumscribe that right. It is not within the power of the commission itself by rule, nor in the appointive power by delegation of authority from the commission, to deprive the civil service employe of this right. Any such rule or delegation of authority would be illegal and void under the civil service act.

People ex rel. Kaster v. Kearney, Com., 164 N. Y. 14; 58 N. E. 64.

In the case just cited the Court of Appeals of New York held that under a provision of the Civil Service Act that “all appointments or employment in the classified service shall be for a probationary term not exceeding the time fixed in the rules,” and authorizing the commission to provide “for a period of probation before an appointment or employment is made permanent,” a rule of the commission which, in addition to fixing the probationary period of six months, provided that “during (such) period the person

so employed may at any time be peremptorily discharged from service" was void as in excess of the power granted. The commission could grant no such power and the head of the department could not lawfully exercise it. That such a power must be granted by the law itself is stated by Parker, C. J., in his concurring opinion, and we quote the opinion here in support of our statement that the test you contend for to determine eligibility to try for promotion in the civil service cannot find support in the spirit of the law nor in the rule of the commission but must be engrafted on the law itself.

Parker, C. J., said:

"It is not unlikely that the public interest would be best subserved if the statute should provide that during the probationary period the person so employed might be peremptorily discharged from the service, but, as it does not, I agree with Judge Landon that so much of the rule as attempts to confer upon the appointing power that authority is invalid."

In support of your contention you point to so much of Section 9 as provides:

"for promotions in such classified service, on the basis of ascertained merit and seniority in service" (and examination),

and "comment" thereon as follows:

"The above provision implies that employes seeking advancement by promotional examination, must in order to be eligible to take such examination, have proved his ability sufficiently in the lower grade to warrant his eligibility for promotion to the upper grade."

What you quote from Section 9 applies as the legal test for determining how promotions shall be made from among those otherwise eligible to take the examination for promotion, and has no application whatever as a test for determining who may take such examination. As already pointed out, the same Section 9 provides in explicit language the test of eligibility to take such promotional examination, namely: "All examinations for promotion shall be competitive among

such members of the next lower rank as desire to submit themselves to such examinations."

Secondly, as stated by you, it is provided by Section 9 that

"the method of certifying (candidate for promotion) shall be the same as provided for applicants for original appointment."

But this has to do only with methods of certifying and not with appointments. The language quoted has no application to the character of the appointments to be made in the cases of original and promotional candidates. Certainly it could not operate to change the express provisions of the law itself as to what must be the respective characters of such appointments. Section 10 of the act, as already adverted to, provides that original appointments shall be for a probationary period and that only on the expiration of such period shall the appointment be deemed complete. This provision applies exclusively to original "Appointment to Classified Service," as indicated by the stated subject-matter of the section, and also by the provision that the appointing officer "shall fill such place by appointment of *the person* certified to him."

"Promotion" in the classified service is governed by Section 9 and the commission is required to "submit to the appointing power the names of not more than *three applicants* for each promotion. Here the legislature places no restrictions, conditions or qualifications on the complete character of the appointment made as it expressly did in the other section as to original appointment, thereby clearly expressing the legislative intent that the original appointment shall be on probation and that appointment to promotion shall not be on probation.

Only by amendment to the Civil Service Act can appointments to promotional positions be made upon probation as in case of original appointments.

We may appropriately conclude our opinion in language paraphrasing that of Chief Justice Parker of the Court of

Appeals of New York, heretofore cited, by saying that it is not unlikely that the public interests would be best subserved if the statute should provide that promotion appointments in the classified service shall be upon such a period of probation as reasonably to qualify such appointee by experience in that rank for the higher position, and that not until such probationary period has expired shall such appointee be eligible to promotion to the higher rank. But as the present law does not make such provision, we are convinced that any rule or ruling of the commission or any construction based on the spirit of the law, as contended for in your communication, which would attempt to carry such provision into effect, would be a violation of the existing law and an exercise of power unauthorized by the legislature.

Yours very truly,

FRANCIS J. VURPILLAT,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Rights of Policeman Under Act of 1921 Who Was Placed on Disability Pension in 1909.

December 10, 1924.

THE RETIREMENT BOARD, Policemen's Annuity and Benefit Fund.

Gentlemen:

Pursuant to letter from Hon. Thomas F. Byrne, Chairman of the City Council Committee on Police and Municipal Institutions, Mr. J. C. Hansen, President of The Retirement Board, has requested a review of the opinion in the case of John Cunningham, rendered September 9, 1922, to The

Retirement Board by the Assistant Corporation Counsel then in charge of pension matters.

The files of the Board in the claim of John Cunningham contain, among other things, an application signed "John Cunningham," bearing date January 25, 1909, in which the said John Cunningham shows service of 18 years, 7 months and 10 days as a patrolman, and makes application "to be retired and dismissed from membership in the police force, and to be placed upon the police pension roll," the words just quoted being followed by the words "under disability clause." On the reverse side of the application appears the following memorandum: "This application was presented at the meeting of the Board of Trustees of the police pension fund held April 13, 1909. Amount allowed \$602.25 per annum."

The files also contain what purports to be a copy of the resignation of John Cunningham dated January 22, 1902, reading as follows:

"I hereby respectfully tender my resignation as a member of the police force of the City of Chicago to take effect January 31, 1909, being incapacitated for active duty, owing to an injury received May 4, 1904, while on duty which made it necessary to amputate my right leg, I wish to be placed on the pension roll." Signed "John Cunningham, No. 1 Police Patrolman of 29th Precinct."

Beneath the name of John Cunningham appears the following:

"I hereby recommend that the resignation of Patrolman John Cunningham No. 1 be accepted and be placed upon the pension roll." Signed "Edward McCann, Inspector, 4th Division,"

and beneath this is a notation to the effect that the resignation was accepted and entered on the register.

As part of the files, hereinabove referred to, there also appears a report of a medical examination dated April 6, 1909, by Dr. Charles J. Rowan, certifying that he had at-

tended John Cunningham for a crushing injury of the right leg which required amputation; that he had attended the said John Cunningham for nineteen weeks at the Cook County Hospital from May 3, 1904; that "at present he is in good physical condition and with the aid of a good artificial leg is fairly active."

There also appears in the files an application of John Cunningham for age and service pension, dated May 23, 1922, and marked "Granted Dec. 8th, 1922" in the amount of \$1,169.32 per annum.

There also appears in the files a copy of a legal opinion rendered by the then First Assistant Corporation Counsel relative to the pension rights of John Cunningham, bearing date September 9, 1922.

John Cunningham will hereafter be referred to as the applicant.

II.

The first question to be considered is, the effect of, and interpretation to be placed upon, the resignation of the applicant. The law requires that to entitle an applicant to a pension the application must be made while the applicant is still a member of the police force (*People v. Abbott*, 274 Ill. 380, 386). It is clear that the resignation of the applicant was not at the time of its filing a separation from the service on the date of the resignation for two reasons: first, because he specifically states that the resignation is "to take effect January 31, 1909"; and second, because, in his resignation, he states that he wishes to be placed on the pension roll because of being incapacitated for active duty. His resignation was clearly a resignation from *active* police duty with a view to being granted disability pension, and this was the basis on which it was accepted as shown by the recommendation of his superior officer who recommended that Mr. Cunningham be placed on the pension roll. The applicant's record of service shows that at the time of his application he

had served a little over eighteen years, and in view of the fact that he had not served twenty years, he was, therefore, not entitled to be retired on age and service pension; the only pension roll on which he could be placed at that time, and the only pension roll contemplated by him and his superior officers was of necessity the disability pension roll. It cannot reasonably be contended that the applicant was resigning from the police department and forfeiting his right to a pension, when he was aware of his pension rights and specifically asked for the pension which his superior officer recommended.

As to the application of the applicant, it was clearly made while he was a member of the police force, for two reasons: first, because his resignation was not effective until January 31, 1909, while his application is dated January 25, 1909, or six days before his resignation became effective; and second, because his resignation from active duty left him still a member of the police force, as will be seen further on.

The application for disability pension was, therefore, valid, aptly filed and legally granted.

III.

The next question to be considered is the status of the applicant in the police department after he was placed on the disability pension roll.

When the applicant was granted a disability pension in 1909, such pension was granted him under the Pension Act of 1887, as amended in 1903, of which Act, Section 4, as amended, reads as follows:

“Whenever any person, while serving as a policeman, in any such city, village or town, shall become physically disabled while in, and in consequence of, the performance of his duty as such policeman, said board shall, upon his written request, or without such request, if it deem it for the good of said police force, retire such person from active service, and order and direct that he be paid from said fund a yearly pension not exceeding

one-half the amount of the salary attached to the rank which he may have held on said police force at the time of his retirement; Provided, that the maximum sum of such pension shall not exceed the sum of \$900 per year, and the minimum not less than \$600 per year. Provided, further, that whenever such disability shall cease such pension shall cease."

Paragraph three of the Act of 1887, as amended in 1907, provided that whenever any person had served for twenty years or more on the regularly constituted police force, the pension board "shall order and direct that such person shall, after becoming fifty years of age, and his service upon such police force shall have ceased, be paid a yearly pension equal to one-half the amount of the salary attached to the rank which he may have held on such police force for one year immediately prior to the time of such retirement," but not exceeding \$900 nor less than \$600 per year.

Section seven of the Act of 1887, which was not included in any amendments of the Act up to 1911, was as follows:

"Any person retired for disability under this act, may be summoned to appear before the board herein provided for, at any time thereafter, and shall submit himself thereto for examination as to his fitness for duty, and shall abide the decision and order of such board with reference thereto. And all members of the police force who may be retired under the provisions of this act, except those who voluntarily retire after twenty years' service, shall report to the chief of police of the city, village or town where so retired on the second Tuesday of each and every month, and in cases of emergency may be assigned to, and shall perform, such duty as said chief of police may direct, and such persons shall have no claim against the city, village or town for payment for such duty so performed."

There was, therefore, a manifest difference in the two kinds of retirement, namely, retirement wholly and altogether from the service, and retirement merely from *active* service. In the former case a fixed pension for life was granted and connection with the police department terminated; in the latter case, a pension conditioned on the

period of disability was granted, but the connection with the police department was continued, with a retirement from *active* service only, and the pensioner subject to being re-assigned to active duty when the disability ceased, subject further to being called into service at any time to perform such duty as the chief of police might direct in cases of emergency, and required to report to the chief of police on the second Tuesday of each and every month. It would be impossible to hold, and no statutory enactment would be valid which would require that disabled persons *not members of the police department* were subject to being assigned to police duty when their disability ceased, and had to report to the chief of police on the second Tuesday of each and every month, and could be called on to perform any duty the chief of police might direct in any emergency, and without payment for such duty so performed. Such a contention would be absurd on its face. These requirements could be applicable only to members of the police department.

Policemen granted disability pension were not *retired from the department*; but were *retired from active service in the department*. A disabled policeman may, for many purposes, be a very useful member of the department in a clerical or other position, even if he had an artificial leg, particularly when he had not as yet reached fifty years of age; and the fact that the statute provides for his submitting himself for examination as to his fitness for duty, requiring him to abide by the decision and order of the board with reference thereto, and holding him subject to assignment to duty in case of emergency, is conformable to this view and necessarily implies that, while not required to perform *full* service, he still is a member of the police department and subject to being assigned to duty under certain contingencies. The statute itself, therefore, shows that the active service of a member may cease without terminating the membership. (*Kavanagh v. Board of Police Pen. Comrs.*, 134 Cal. 50.)

The courts of several jurisdictions have ruled as above set out, but it will not be necessary to go outside our own

state for a legal holding to this effect. In the case of *McGann v. Harris*, 114 Ill. App. 308, the court, in discussing Section 4 of the Act of 1887, said:

“In the seventh section of the act is found a provision requiring all members of the police force retired as above to report to the chief of police once every month, and it is provided that in case of emergency they may be assigned to such duty as the chief of police may direct. While, therefore, the statute apparently contemplates that a policeman physically disabled while in, and in consequence of the performance of his duty shall be retired from active service, it regards him as still a member of the force notwithstanding such retirement, subject to being assigned to duty in case of emergency.”

It is very evident, from a standpoint of both common-sense and law, that a policeman granted a disability pension under the Act of 1887, as amended, continued to be a member of the police force.

IV.

The applicant, having continued to be a member of the police force or police department under the law of this state, until such time as he should resign, die or be discharged, what was his status under the Act of 1921?

The Act of 1921 defines only two classes of policemen, viz: “Present Employees” and “Future Entrants,” as follows:

“Present Employee”: Any policeman who shall be in the employment of such city as a policeman thereof on the thirty-first day in the month of December of the year in which this Act shall come in force and effect in such city.”

“Future Entrant”: Any policeman who shall be employed as a policeman of such city for the first time on or after the first day in the month of January of the first year after the year in which this Act shall come in force and effect in such city.”

Policemen placed on disability pension prior to January 1, 1922, who recovered from such disability after January 1, 1922, were, by The Retirement Board, restored to duty; they were then reassigned to police work by the police department. They were not "future entrants." Were they "present employes"?

Sections 35 and 36 of the Act of 1921 treat, respectively, of policemen who were pensioners of a police fund and of policemen in police service prior to December 1, 1921, and who re-entered the service after January 1, 1922, but no section of the Act of 1921 specifically alters or affects the status of policemen disability pensioners who do not re-enter the service. What then is their status? They are members of the police department (*McGann v. Harris*, 114 Ill. App. 308), and our Supreme Court has held that all members of the police department are policemen (*People v. Foreman*, 296 Ill. 487). Yet, they cannot be said to have been continuously "in the employment of the city," since they were retired from active duty and thereafter received no pay from the city, but were paid out of a pension fund to which they had themselves contributed, unless it be held that the portion of the pension contributed by the city constituted payment by the city. This view finds support in the provision of the law (Act of 1887, Section 7, hereinabove quoted) where it states that disability pensioners called on to perform emergency duty should have "no claim against the city for such duty so performed," it apparently being the understanding and intention of the framers of the Act that the portions of the disability pension paid by the city should constitute pay for any duty performed by a disability pensioner under the Act.

In order to meet a situation for which the legislature had apparently not provided, those originally charged with administering the Act, in 1922, bridged the difficulty by treating policemen granted disability benefit prior to the Act of 1921 in the same manner, as nearly as possible, as those granted disability benefit under the Act of 1921, so far as

allowance of time was concerned. This appeared to be the logical, reasonable and only way in which to preserve the constitutionality of the Act, since an Act must apply equally to all those in the same class affected by the Act. Retirement on disability pension, accompanied as it was by a condition of compulsory return to service under certain contingencies, was accordingly construed as a "leave of absence" and the applicant to be a "present employe." If this be a correct interpretation, then the applicant was entitled to be granted an age and service annuity under the provisions of the Act of 1921, and the opinion rendered in his case on September 9, 1922, was under these circumstances, a correct application of the rules of law governing the interpretation and application of a statutory enactment from the apparent viewpoint of the writer of the opinion in question, so far as the said opinion related to the applicant's right to age and service annuity. (In view of what follows, the amount of such annuity need not be here discussed.)

There is, however, another viewpoint:

While it is true that a policeman on disability pension continued to be a member of the police department subsequent to his being retired from active duty, it does not necessarily follow that he became a "present employe" or a "future entrant" after the Act of 1921 came into force and effect. Such a policeman was a disability pensioner in the police department, and if his disability ceased after January 1, 1922, he was assigned to police duty, not because he was a "present employe" but by virtue of the Act under which he was pensioned and which Act especially provided, in 1887 (and in 1909), that at any time after being granted a pension, a disability pensioner should submit himself to the board for examination as to his fitness for duty, and should abide the decision and order of the board with reference thereto, and that "whenever such disability shall cease such pension shall cease"; in 1911, Section 4 of the Act of 1887 was amended so as to provide that,

“Whenever such disability shall cease such pension shall cease, and such person shall thereupon be reinstated in the department in the rank held by him at the time of his retirement.”

The Act of 1915, and the amendment thereto of 1917, both contain the same provisions.

Thus, by virtue of the same section of the Act under which a policeman was placed on disability prior to January 1, 1922, and by virtue of which The Retirement Board continued to pay his pension as required by Section 50 of the Act of 1921, it became the duty of The Retirement Board to reinstate him in his former rank in the department whenever his disability ceased. He was entitled to such reinstatement, could have enforced it whenever his disability had ceased, and The Retirement Board was by law compelled to reinstate him. Consistent with this viewpoint, it would not be necessary to classify a policeman either as a “present employe” or a “future entrant,” since, after he had been restored to active service, he would be treated in accordance with the provisions of the Act of 1921 relating to policemen who “re-enter” the police service.

While the above viewpoint disposes of policemen on disability pensions who re-enter the service, it also harmonizes with the Act of 1921 as concerns the right of such disability pensioned policemen who do not re-enter the service, of which class the applicant is a member. From this viewpoint, the Act apparently leaves them just where they were before the Act was enacted, for nowhere does the Act of 1921 specifically mention them. The Act of 1921, Section 50, provides, among other things, as follows:

“All annuities, pensions and other benefits allowed prior to the first day in the month of January of the first year after the year in which this Act shall come in force and effect in such city, by the board of trustees of such police pension fund, shall thereafter be paid by the said retirement board from the annuity and benefit fund herein provided for, according to the law or laws under which such annuities, pensions, or other benefits were allowed.”

This was the only grant of power in the Act as far as concerns disability pensioners who do not re-enter the service, and The Retirement Board has no powers excepting those granted by the Act creating it.

Section 45 of the Act of 1921 empowers the board to suspend *disability benefits* granted under that Act when a policeman reaches age 57, and thereafter to pay him an age and service annuity; it confers no such direct power as to a policeman retired on disability benefit under another pension Act, but merely provides that such pension shall be paid according to the law under which it was allowed. If this viewpoint be correct, then the status of the applicant was not changed by the Act of 1921, and, in the absence of a direct grant of power, it is doubtful as to whether the board had jurisdiction to consider the application for age and service annuity filed by the applicant.

V.

It is true that our Supreme Court has held that, "The purpose of pension laws is beneficial, and statutes of that character should be liberally construed in favor of those intended to be benefited" (*Colton v. Trustees*, 287 Ill. 56, 61), but the Act of 1921 is not strictly speaking a pension Act. It is an annuity and benefit fund Act formulated and constructed, as nearly as practicable, on an actuarial basis, with the intent of paying to each beneficiary such annuity or benefit as his contributions, the city's contributions, and possible gifts, will actually purchase, and no more, and at the same time preserve all rights existing under former pension Acts. Based on scientific computations, the principle of liberal construction is not presumed to be necessary nor justifiable as applied to an Act of this character, excepting as to those provisions which have to do with rights existing under former pension Acts; and unless a policeman, or class of policemen, is, or are, specifically included as a beneficiary or beneficiaries, or his, or their, beneficial rights and duties set out in the Act, it appears to me that he, or they, is, or are,

excluded from the benefits of the Act, other than as the Act may preserve his, or their, existing rights. The Act of 1921 is a long step in advance of the old pension laws, but the application of its provisions to cases as they arise in the police department has unavoidably developed a number of points at which it can be improved and clarified, if the doctrine of liberal construction is not to be resorted to or followed.

While admitting that the Act of 1921, as applied to the case of the applicant, is open to the construction placed upon it in the opinion rendered September 9, 1922, so far as that opinion relates to granting annuity, I am of the opinion that the better and equally reasonable view to take is, that the Act makes no provision as to disability pensioners who do not re-enter the service, beyond the payment of their pensions, and that The Retirement Board was without jurisdiction to act on the application filed May 23, 1922.

As the judges of our courts of record and of the Appellate and Supreme Courts frequently disagree as to the proper interpretation and application of the laws, I believe that, in a case involving questions as close and as technical as this, the Act should be either amended to clarify the situation or a ruling sought from the Supreme Court of this state, in justice to the policemen involved and as a guidance to The Retirement Board. And even though the judges of the Supreme Court may differ in their views, just as lawyers frequently differ, and may sometimes decide a case with four judges holding one way and three judges holding the other, yet whenever four or more judges hold one way, their holding or opinion becomes the law of the State. Unless the legislature amends the Act, this would be a proper question for the Supreme Court to pass upon. It could be brought before the courts in one of two ways, viz:

1. If the Retirement Board holds, in accordance with the views above expressed, that their predecessors on the board had no jurisdiction to act on the application then it can suspend the annuity, restore the applicant to his former disability pension rights, and leave the applicant to bring action in mandamus, if he so desires.

2: If the Retirement Board holds that its predecessors on the board had jurisdiction to act on the application, but that the opinion rendered September 9, 1922, was erroneous as to the periods of time to be allowed applicant, an annuitant or other person having a beneficial interest in the fund would have to bring proceedings for an injunction to restrain further payment, because, that interpretation having been followed and the legislature having since met and adjourned without amending the law, and no judicial ruling having been sought, the board would probably be held bound by the interpretation so adopted and applied, if the board had jurisdiction to act in the matter in the first place.

V I.

Much can be said on behalf of a policeman who, for many years, remained a member of the department, subject at any time to being called upon to do clerical duty, watchman service, or emergency work, even though he were receiving the equivalent of half pay after over eighteen years of active service. Particularly is this true in the light of the provisions relating to disabled policemen under the Act of 1921, which grants them 75 per cent of their then salary during disability, gives them annuity credit for the period of disability and retires them on age and service annuity at the age of 57.

On the other hand, under the former pension Acts, disability pensioners were granted the same rate of pension as those retired on age and service, viz.: half pay; and in 1915, the legislature continued this pension in their widows and children and provided the same pension rights for widows and children of disability pensioners as had theretofore been granted to the widows and children of age and service pensioners; excepting, that as to the widow of a disability pensioner, the marriage must have taken place prior to his having become disabled. In the instant case, the marriage took place *after* the applicant became disabled, which fact would apparently deprive applicant's widow of a pension, in the absence of legislative relief to this class of widows.

The chief point of difference between the rights of the age and service pensioner and the disability pensioner, other than their widows' pensions, appears to be that after the age and service pensioner had retired, his time and services belonged only to himself, for the balance of his life, and he could do as he pleased; while the disability pensioner (who may have lacked only a year or two of completing twenty years of service) was bound, during all the balance of his life, to devote part of his time to reporting to the chief of police on the second Tuesday of every month (unless excused in writing), to presenting himself for physical examination whenever called by the board, and to holding himself at all times ready to perform police duty in case of emergency.

If the legislature believed, or believes, that this condition justifies some recognition and the granting or bestowal of compensatory rights under the Act of 1921 other than those now existing, with the ultimate retirement of such disability pensioner on age and service annuity at age fifty-seven, or at any other time, I feel that it should be left for the legislature to definitely say just what should be allowed and when, and that the Retirement Board should not be required, nor should it assume, to read such rights into the law as it now stands, in order to do what might appear to be necessary to the uniform application of the Act.

If retirement from active service because of disability, subject to recall to duty, is to be construed as "leave of absence," as has been done, or if a disability pension is to be construed as not strictly a pension but as a disability benefit co-existent in point of time with the disability, or if all members of the police department are to be held as being in the employment of the city, then the applicant was unquestionably entitled to age and service annuity under the Act of 1921. But, while a lawyer may express an opinion in this matter, only a court or the legislature can finally determine when and how age and service shall be granted; and since the legislature has seen fit to define some of the terms used in the Act of 1921, it appears to me that the above terms, not

having been specifically defined, must be given their usual and ordinary meaning (*People v. Muldoon*, 306 Ill. 234, 238).

VII.

As The Retirement Board was, therefore, apparently without power or jurisdiction to grant any age and service annuity in any amount to the applicant, it will not be necessary to consider what amount of annuity should have been allowed.

VIII.

In consonance with the views hereinabove set out, I am of the following opinion:

1. The applicant's resignation was from active duty only.

2. The disability pension granted applicant on April 13, 1909, was legally granted.

3. The applicant continued to be and still is a member of the police department.

4. The Act of 1921 does not authorize nor empower The Retirement Board to grant age and service annuity to a policeman granted a disability pension under a former pension Act, until after his re-entry into active service.

5. The annuity provisions of the Act of 1921 do not apply to disability pensioners who have not re-entered the active service subsequent to January 1, 1922.

6. The Retirement Board should suspend the annuity granted the applicant on December 8, 1922, under the power granted it in paragraph (g) of Section 6 of the Act of 1921.

7. The overpayments made by virtue of the award dated December 8, 1922, are not recoverable, having been made through mistake of law.

8. The applicant should continue to be paid a disability pension as provided in Section 50 of the Act of 1921.

9. Legislative relief should be sought for the wives of policemen in the class of the applicant, if it be desired to provide for the widows of men in that class.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Construction of Section 55 of Police Pension Fund Act of 1922.

December 10, 1924.

THE RETIREMENT BOARD, Policemen's Annuity and Benefit Fund.

Gentlemen:

Pursuant to letter from Hon. Thomas F. Byrne, Chairman of the City Council Committee on Police and Municipal Institutions, Mr. J. C. Hansen, President of The Retirement Board, has requested a review of the opinion on Section 55 of the Police Pension Act of 1921, rendered January 30, 1922, to The Retirement Board by the Assistant Corporation Counsel then in charge of pension matters.

I.

Section 55 of the Policemen's Annuity and Benefit Fund Act, approved June 29, 1921, is as follows:

“Section 55. Notwithstanding the provisions of any foregoing section or sections of this Act, any present employe who shall resign or be discharged from the service on or after the first day in the month of January of the first year after the year in which this Act shall come in

force and effect in such city, and after he shall have completed twenty (20) or more years of service and for whom the amount of annuity provided in accordance with the foregoing provisions of this Act shall be less than the amount stated hereinafter in this section shall have a right to receive annuity as follows:

Any such present employe who shall be fifty (50) or more years of age at the time of his resignation or discharge from the service shall have a right to receive annuity, from and after the date of such resignation or discharge, of an amount equal to fifty (50) per cent of the salary of such present employe as such salary shall be at the time of his resignation or discharge from the service.

Any such present employe who shall be less than fifty (50) years of age at the time he shall resign or be discharged from the service shall have a right to receive annuity, from and after the date upon which he shall become fifty (50) years of age, of an amount equal to fifty (50) per cent of the salary of such present employe as such salary shall be at the time of his resignation or discharge from the service but not in excess of the sum of nine hundred dollars (\$900.00) a year."

II.

The opinion asked to be reviewed, omitting caption and signature, and numbering the paragraphs thereof for easier reference, reads as follows:

"We beg leave to acknowledge the receipt of your request for a construction of Section 55 of the Act entitled "An Act to provide for the creation, setting apart, maintenance and administration of a policemen's annuity and benefit fund in cities having a population exceeding two hundred thousand inhabitants," "Approved June 29, 1921, in force and effect July 1, 1921, and to advise you what annual pension should be granted to police officers who have completed a service of twenty years in the department and have reached the age of fifty years, and whether said Section 55 in any way regulates or controls the amount of annuity to be granted to such police officers.

"In reply, we beg leave to advise you that, in order to answer your inquiries, it will be necessary for us to consider and call your attention to parts of Section 12 of said Act (page 271, Laws of Illinois, 1921) which define the meaning of certain words and phrases as used in said Act, and which are as follows:

'Future entrant': Any policeman who shall be employed as a policeman of such city for the first time on or after the first day in the month of January of the first year after the year in which this Act shall come in force and effect in such city.

'Present Employee': Any policeman who shall be in the employment of such city as a policeman thereof on the thirty-first day in the month of December of the year in which this Act shall come in force and effect in such city.

'Salary': Annual Salary: Provided, that two thousand six hundred dollars (\$2,600.00) shall be the maximum amount of the annual salary of any policeman which shall be considered for any purpose under this Act. Any amount of annual salary in excess of said amount of two thousand six hundred dollars (\$2,600.00) which any policeman shall receive shall not be considered for any purpose under this Act."

"Section 55, which appears on page 309, Laws of Illinois, 1921, reads as follows:

'Notwithstanding the provisions of any foregoing section or sections of this Act, any present employe who shall resign or be discharged from the service on or after the first day in the month of January of the first year after the year in which this Act shall come in force and effect in such city, and after he shall have completed twenty (20) or more years of service and for whom the amount of annuity provided in accordance with the foregoing provisions of this Act shall be less than the amount stated hereinafter in this section shall have a right to receive annuity as follows: Any such present employe who shall be fifty (50) or more years of age at the time of his resignation or discharge from the service shall have a right to receive annuity, from and after the date of such resignation or discharge, of an amount equal to fifty (50) per cent of the salary of such

present employe as such salary shall be at the time of his resignation or discharge from the service.

‘Any such present employe who shall be less than fifty (50) years of age at the time he shall resign or be discharged from the service shall have a right to receive annuity, from and after the date upon which he shall become fifty (50) years of age, of any amount equal to fifty (50) per cent of the salary of such present employe as such salary shall be at the time of his resignation or discharge from the service but not in excess of the sum of nine hundred dollars (\$900.00) a year.’

“In discussing the construction of statutes, our Supreme Court, in the case of *People v. Rose*, 166 Ill., page 432, said:

‘Now it is a settled rule of construction that where there are two provisions, one of which is general and designed to apply to cases generally, and another is particular and relating to only one subject, the particular provision must prevail and it must be treated as an exception to the general provision. This rule is stated in Endlich on the Interpretation of Statutes (Sec. 399), as follows: In such cases the special provisions upon that particular subject indicate an intention that it is not to be included in the general provision, and the latter is held inapplicable to it, or, as is sometimes said, is controlled by the special provisions. Where, therefore, there is in the same statute a particular enactment and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment. It follows that where an Act in one set of provisions gives specific and precise directions to do a particular thing, and in another act prohibits in general terms, the doing of that which, in the broad sense of the words used in the latter, would cover the particular act authorized by the former, the more general provisions cannot be deemed to include the matters embraced in the more special ones.’

“The term ‘Annual salary’ as defined in said Section 12 of said act is defined to mean ‘two thousand six hundred dollars (\$2,600,000) per annum.’ It also provides that ‘Any amount of annual salary in excess of said amount of two

thousand six hundred dollars (\$2,600.00) which any policeman shall receive shall not be considered for any purpose under this Act.' The language used could not be more sweeping to make it general, or to make it apply generally in the construction of the provisions of the Act in question.

"An examination of the provisions of Section 55 forces us to the conclusion that, while the said section contains words that compel us to conclude that it was the intention of the General Assembly to have the said Section 55 modify and control the provisions of all other sections of the Act, such control or modification is limited only to present employes, and the amount of annuity that future employes, within the meaning of the Act, shall annually receive is in no way affected by the provisions of said Section 55. It therefore follows that, the terms and provisions of said Section 55 being special and not general provisions, under the rule of construction repeatedly announced by our Supreme Court, the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment, and the terms and provisions of Section 55, which only affect the annuity to be granted to present employes must control and supersede the provisions contained in Section 12.

"In conclusion, we, therefore, beg leave to advise you that any present employe who shall have completed a service of twenty years or more, and for whom the amount of annuity provided in accordance with the provisions of the act entitled "An Act to provide for the creation, setting apart, maintenance and administration of a policemen's annuity and benefit fund in cities having a population of two hundred thousand inhabitants" shall be less than the amount stated hereinafter, shall have a right to receive an annuity as follows:

'Any such present employe who shall be fifty (50) or more years of age at the time of his resignation or discharge from the service shall have a right to receive annuity from and after the date of such resignation or discharge of an amount equal to fifty (50) per cent of

the salary of such present employe as such salary shall be at the time of his resignation or discharge from the service.

Any such present employe who shall be less than fifty (50) years of age at the time he shall resign or be discharged from the service shall have a right to receive an annuity from and after the date upon which he shall become fifty (50) years of age, of an amount equal to fifty (50) per cent of the salary of such present employe as such salary shall be at the time of his resignation or discharge from the service, but not in excess of the sum of nine hundred dollars (\$900.00) a year.' "

III.

It seems to have been assumed by the former members of The Retirement Board, in 1922, that the foregoing opinion justified, directed or required the payment, to those included within the terms of Section 55, of an annuity in an amount equal to one-half their actual compensation. The opinion of January 30, 1922, does not make such ruling. The only holdings in that opinion are that Section 55 of the Act of 1921, is a special provision, and that it applies only to "present employes," or to those policemen who were in the service of the City on December 31, 1921.

The Act of 1915, as amended in 1917, provided that after twenty (20) years of service a policeman had a right to make application for retirement when such policeman had arrived at the age of fifty years; that the pension to be granted him should be an amount equal to one-half of the amount of the salary attached to the rank which he may have held in said police force for one year immediately prior to the time of his retirement, provided that the general superintendent of police should not receive more than \$1300; the first deputy superintendent \$1150; \$1100 to captains; \$1000 to lieutenants, and to all other persons not to exceed \$900 nor less than \$600 per annum; that any policeman who had served twenty years and had not reached fifty years of age might make application for retirement and if he continued to make certain monthly contributions to the pension fund he would be en-

titled to a pension after he reached fifty years of age in an amount equal to one-half his salary at time of resignation or discharge, but not in excess of \$900 per year.

It is a rule of construction that one may consider the state of the law prior to the enactment of the statute sought to be construed. In the case of *Wright v. The People*, 101 Ill. 126, our Supreme Court said (page 131):

“It is universally conceded that one of the most efficient means of ascertaining the legislature’s intention in the adoption of a new statute is to consider it with reference to the state of the law before its adoption, and particularly with reference to the previous legislation on the same subject.”

It is very clear, in view of previous legislation on pensions, that, if any force at all is to be given Section 55, it should be construed solely as a preservation of rights had by policemen when the Act of 1921 came into force and effect, so far as twenty years of service, and the right of retirement at fifty years of age or before, are concerned.

Whether or not Section 55, being a special provision, and being presumably a restatement of the retirement rights of the Act of 1915, as amended, used the word “salary” in the same sense as that word was used in the former act, namely, “actual compensation,” is so close a question that only the court or the legislature can finally determine it.

As a general principle of law, when a provision of one act is carried over into a later act, the meaning given the words and terms used in the original act are applied to the same words and terms when used in the later act. Our own statute (Ch. 131, Paragraph 2) provides that:

“The provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such prior provisions and not as a new enactment.”

Whether, then, the provisions of Section 55, “so far as they are the same” as the provisions of Section 3 of the Act of 1915, as amended, would consequently be construable as

a continuation of the prior provision, without the limitation as to amount of pension and the continuing contribution which the prior act contained, is a question which requires clarification by the legislature or adjudication by the courts.

I have heretofore, on December 1, 1923, rendered an opinion relative to the position of The Retirement Board, at that later date, so far as concerned the application of Section 55. It was then called to my attention that the former Retirement Board had theretofore placed a construction on Section 5, presumably based on the opinion of January 30, 1922.

I feel that as the opinion of January 30, 1922, did not deal specifically with the question of the *amount* of pension payable under Section 55, it was the duty of the board to have secured an opinion on that phase of the section before making any awards, or to have declined to act until a judicial interpretation had been obtained. However, the board, having, from the inception of the act, placed upon Section 55 the interpretation and application which it adopted, and the legislature having thereafter met and adjourned without amending the act or clarifying its meaning, and there having been no judicial construction sought by those financially interested in the fund for a period of practically two years, I was and am of the opinion that the present Retirement Board was and is bound by the interpretation placed upon the said Section 55 until either the legislature acts or until a judicial ruling is secured (25 Ruling Case Law, page 1043).

I V.

There are two courses, either one of which could be followed with a view to the future application of Section 55, in accordance with the possible intent of the legislature.

One is to have the payment provision of Section 55 made absolutely definite, by adding to the second paragraph some such words as "provided, however, that such annuity shall not exceed the sum of \$1300," or the words "provided, that

'salary' shall mean 'salary' as defined in Section 12 of this act."

The second course would be, to secure a legal adjudication, which can be obtained in one of two ways: First, The Retirement Board, by virtue of the power given it in Paragraph (g) of Section 6 of the Act of 1921, could suspend all payments now being made under Section 55 in excess of the sum of \$1300, and place upon the annuitants the burden of bringing action to enforce payment of the amount originally granted. I doubt if this would be advisable for the reason that, if the court should hold that the board, having had jurisdiction in this class of cases, and having placed an interpretation upon Section 55, and having administered the act in accordance with that interpretation, and the legislature having met and adjourned without making any change in the section, and there having been no judicial construction sought by those financially interested in the fund, the board is now bound by that interpretation so far as annuities already granted are concerned. Then in that event, The Retirement Board would be compelled to continue those pensions at the rate heretofore allowed. Second, some person, having a financial interest in the annuity and benefit fund, could file proceedings for an injunction to restrain the board from making any payments under Section 55 in excess of \$1300.

Any litigation brought would, undoubtedly, require a couple of years before an adjudication was finally had; on the other hand, the legislature meets very shortly and a proper amendment, as hereinabove suggested, could readily be passed as emergency legislation, to go into force and effect from and after its passage. Or both, injunction proceedings could be brought and action by the legislature requested.

I am of the opinion that the opinion of January 30, 1922, which I have been asked to review, may be a correct legal construction and interpretation of Section 55 of the Act of 1921, so far as extends to the matters covered in that opinion; but I am also of the opinion that the members of The Retirement Board, who were administering the Act in 1922, should

have insisted upon a legal adjudication as to the principles of law which should govern the interpretation to be placed upon the wording of that section as a special provision of the act, before adopting the policy of paying to those embraced in that special provision one-half the salary as the word "salary" was construed under the Act of 1915, as amended, instead of one-half the salary as the word "salary" is defined in the general provisions of the Act of 1921.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Supplement to Preceding Opinion.

December 18, 1924.

THE RETIREMENT BOARD, Policemen's Annuity and Benefit Fund.

Gentlemen:

Complying with your request for suggestions as to procedure in connection with Opinion No. 729 heretofore rendered by me relative to Section 55 of the Police Pension Act of 1921, I submit the following recommendations, which, I believe, are also conformable to those of the Committee on Police and Municipal Institutions of the City Council of the City of Chicago:

FIRST: That any policeman now being paid under Section 55, the amount of whose payment is \$1300 per year or less, and who is properly payable under that section, be continued to be paid the amount properly payable to him.

SECOND: That any policeman now being paid under Section 55, the amount of whose payment is in excess of \$1300 per year, have his annuity computed under the general provisions of the act, and if such annuity be in excess of \$1300 per year, then and in that event such policeman be paid such annuity as so computed, subject to the limitations of Section 37 of the act, and no more. If, however, the annuity so computed is less than \$1300 per year, then such policeman shall be paid one-half his actual salary, or such annuity, whichever may be the larger amount, but not in excess of \$1300 per year, if such policeman is properly payable under Section 55.

THIRD: That in all cases embraced in paragraph "second" above, in which the amount to be paid as hereinabove recommended is less than the amount heretofore paid such policeman, such policeman be sent a letter of explanation to the effect that the difference between his former pension payment and the new payment is being withheld until a judicial construction can be secured as to the proper interpretation and application of Section 55.

Yours respectfully,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

I believe the above suggestions to be in conformity with the recommendations of the Committee on Police and Municipal Institutions of the City Council of the City of Chicago, so far as the same apply to suspending payments in excess of \$1300 per year under Section 55 of the Act of 1921.

EDGAR J. COOK,
*Special Attorney for the Committee
on Police and Municipal Institu-
tions of the City Council of the
City of Chicago.*

Closing of Driveway When Bond for Driveway is Permitted to Lapse.

December 11, 1924.

HON. F. J. TOMCZAK, Alderman, 39th Ward.

Dear Sir:

We have your letter of inquiry of December 5th in which you ask whether or not the city can compel the closing of a driveway when bond for such driveway is permitted to lapse.

Please be advised that by virtue of Section 3567 of The Chicago Municipal Code of 1922 it is essential to provide and keep a bond satisfactory to the Commissioner of Public Works in full force and effect during the life of the permit for a driveway. Should such bond ever fail to be kept in full force, then the authority and privileges granted under the permit shall thereupon cease.

Upon the revocation of the permit, it will be necessary for the owner of the property to replace the driveway space to a condition similar to the remaining portion of said sidewalk space and if within a reasonable time he fails to do so, the city can do the work and charge the expense thereof to such owner.

Very truly yours,

JAY A. SCHILLER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Payment of Medical Expenses of Policemen and Firemen Injured in Performance of Their Duty.

December 12, 1924.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir :

You have submitted to this office the papers concerning the claim of Mr. J. J. Connolly, engineer of Engine Company No. 40, for hospital expenses, and have requested this department to render you an opinion relative to the legality of said claim.

The facts are that about April 1, 1924, Mr. Connolly was coming down a pole at midnight in the fire station and received an injury. On June 12, 1924, he was operated upon at the Washington Park Hospital by Dr. Rosch, and on June 26, 1924, a more serious operation was performed at the Lakeview Hospital by Dr. Andre L. Stapler. There does not seem to be any conflict in the opinions of the various doctors and of the City Physician, who examined him on December 6, 1924, as to the question of the nature of his ailment or as to the cause of the same. The doctors all agree that Mr. Connolly was afflicted with a cancerous condition of a portion of his body, and it is the opinion of the physician who attended him that this condition was caused to become malignant by the bruise which he received by sliding down the pole. The report of Dr. Jones, the City Physician, does not in any way dispute the contention that the condition was caused to become serious by the accident. An examination of all of the correspondence shows that although the cancerous condition was present before the accident, the accident caused the same to develop at the time when it did, and there is no telling when the condition would have become malignant, if ever, but for the accident.

Although the City is probably not legally obliged to pay claims of firemen for accidents received while in the performance of their duty, the City Council has nevertheless adopted the policy of paying such hospital and medical expenses. The following resolution was passed by the City Council on June 29, 1922 (page 712, C. P. of June 29, 1922):

“WHEREAS, the City Council on February 10, 1922 (Council Journal, page 904), made an appropriation of \$15,000 for the purpose of paying claims for hospital and medical expenses of policemen and firemen injured while in the actual performance of their duty, this appropriation being designated as 22-S-4; and

WHEREAS, It is deemed necessary that a policy be defined in the handling of the claims of such employees of the City; therefore, be it

RESOLVED, That it is the sense of the City Council that claims of policemen and firemen to be considered for payment from the aforesaid appropriation shall be such claims as may arise on account of hospital and medical expense incurred as a result of injuries due to the hazards of the duties performed by policemen and firemen, and not to accidents which are liable to happen to any individual during the ordinary course of business or work; and be it further

RESOLVED, That it is the sense of the City Council that the consideration of claims be limited to those arising from injuries sustained during the year 1920 and subsequently, on account of the policy of paying such claims not having been adopted prior to 1920.”

It is our opinion that the foregoing claim is one which can fairly be said to have arisen from an injury due to the hazards of the duties performed by the firemen, and that it should be paid.

You have also suggested the advisability of arranging for a board of review to decide the questions arising from a difference of opinion among physicians and the City Physician, if any. If such a plan is to be adopted, it would have to be done by ordinance. At the present time, the City Physician is the duly constituted public authority to investigate these matters, and his decision, in the absence of fraud

or a clear abuse of discretion, should be binding upon the City.

We make the suggestion, however, that in case any difference of opinion does arise between the report of the City Physician and that of other physicians, the matter should be re-submitted to the City Physician with the request that he review the matter in connection with the additional reports for the purpose of changing or modifying his conclusion, if he deem it advisable.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Settlement of Claim for Damages Arising Out of Burst Water Main.

December 16, 1924.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

We return herewith files pertaining to the claim of Simmons Company for loss sustained by them on July 2, 1924, caused by the breaking of a 48 x 36 inch Y branch in the water main located in the alley at 14th street, between Indiana avenue and Michigan boulevard. We are also submitting, in accordance with your request, our opinion as to liability and a recommendation for the settlement of this claim.

The law is well settled, that: "The distribution of water to its inhabitants for profit by a city is a purely commer-

cial transaction. Therefore a municipality is liable for the negligence of its employes, in connection with its water department, as it is acting in its private, as distinguished from its governmental capacity."

In view of the law cited above, it therefore remains to establish whether or not the break was caused by the negligence of its employes in order to create liability on the part of the City of Chicago. The reasons for the break are not clear, as is evidenced by the attached copy of a report submitted to the Law Department by Mr. John Ericson, City Engineer.

If suit were to be filed for the damage sustained, and the claimant made out a *prima facie* showing of negligence, the burden would then be on the city to rebut the proof of negligence, and apparently from the facts at hand the city could not explain the break, so that it is possible the city would be held liable for the total damage suffered. However, as it is a disputed question whether or not the city is liable, we believe it is for the city's best interest to settle this claim without suit, providing a satisfactory settlement can be effected.

In our opinion a settlement on a basis of 50 per cent of the actual damage would be satisfactory. We, therefore, recommend, in view of the question of liability, payment of \$1,316.52 in full settlement of this claim. In the event the claimant does not accept the settlement offered we further recommend that the claim be declined.

Respectfully submitted,

LAWRENCE J. FENLON,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Right of City Employee in Labor Service to Contribute
to Municipal Employees' Pension Fund.**

Chicago, December 17, 1924.

THE RETIREMENT BOARD, Municipal Employees Annuity and
Benefit Fund.

Gentlemen:

Your communication of December 10, 1924, states that Thomas J. Watson, laborer, Bureau of Engineering, Meter Shops, has applied to become a participant in the M. E. A. & B. Fund under the labor clause; that the records of the labor division of the Civil Service Commission show that he was certified April 18, 1913, laid off November 30, 1917, failed to report April 18, 1918, was restored to list October 5, 1923, and reinstated September 29, 1924.

Section 12 of the Act of 1921, as amended in 1923, in defining "municipal employee," states, among other things, that the definition there given shall not include, and the Act shall not apply to, any person employed in a position classified by the Civil Service Commission of such city as in the labor service unless such person, if he shall not be in the service of such city at the time the Act came into force and effect, shall within six months' time and after the date upon which he shall enter the service make application to the Retirement Board in writing to be included under the provisions of the Act.

Your communication inquires as to whether or not the restoration of Mr. Watson's name to the eligible list means that he should be classified as a "present employee" or as a "future entrant." Mr. Watson is not to be classified under either heading, but he is to be treated as a "municipal employee" who was not in the service of the city on December

31, 1921, and who was in such service prior to that date, and who re-entered the service after that date, and before attaining an age of 65 years, in accordance with the provisions of Section 36 of the Act.

I am of the opinion that if Mr. Watson is not 65 years of age, he is entitled to become a participant in the Municipal Employes Annuity and Benefit Fund, and to be included under the provisions of Section 36 of the Act of 1921, as amended.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Power of Pension Board to Grant Pension to Member on Disability Pension Roll.

December 18, 1924.

THE RETIREMENT BOARD, Policemen's Annuity and Benefit Fund.

Gentlemen:

The records show that the above named pensioner was granted disability pension under a former police pension act, and, without having been restored to active duty in the police department after having resigned therefrom to go on disability pension, was granted age and service annuity under the Act of 1921, pursuant to policy theretofore adopted by the Retirement Board in 1922.

There is nothing in the Police Pension Act of 1921, which gives to The Retirement Board power, authority or jurisdic-

tion to grant age and service annuity upon the facts as presented to me in this case.

I am of the opinion that the age and service annuity granted to Alton E. Gosso, the above named petitioner, should be discontinued, and that the above named pensioner should be restored to the roll of disability pensioners, on which he was originally placed.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Failure to Perform City Contract Within Time Specified.

December 22, 1924.

HON. JOHN T. MILLER, Commissioner of Gas and Electricity.

Dear Sir:

We have your communication, together with blue prints and copy of contract awarded to the American Concrete Products Co. for furnishing and delivering 700 concrete sign posts to your department to be used for the installation of illuminated stop signs. You express the desire to cancel this contract because there is an admitted failure on the part of the contractor to perform according to the provisions contained therein.

We find set out in Division "A," Item No. 1 (page 38) of said contract that delivery of these posts will begin on September 15, 1924, and be completed December 15, 1924.

Our information is that up to the present time, which is past the date for final delivery, there have been no posts delivered per contract.

Article 20 of the agreement between the City and the contractor specifically covers the point raised in your letter. We quote:

“Forfeiture of Contract:

Art. 20. It is further agreed by and between the parties hereto that if said Contractor fails financially or abandons this contract or fails, refuses or neglects to fully complete said work within the time specified or as extended, or if in the opinion of the Commissioner of Gas and Electricity the work has been or is being delayed so that said work cannot be completed within the time specified or as extended, or from any other cause whatsoever said Contractor is unable to carry out said contract and complete said work; or if the contract shall be assigned by said Contractor except in the manner heretofore specified, then said City of Chicago may declare this contract forfeited either as to a portion of the same or the whole thereof.”

The Company having accepted the contract containing this forfeiture clause, it is necessarily bound by its contents, and having utterly failed to comply with its provisions as to time of delivery when it was declared in said contract that “time was of the essence of the contract,” you are privileged to forfeit the whole of said contract by formally notifying the American Concrete Products Company to that effect.

Very truly yours,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Procedure to Place Public Policy Question on Ballot.

December 22, 1924.

HON. JOHN J. COUGHLIN, Alderman, First Ward.

Dear Sir:

Replying to your verbal request, we submit the following report in respect to the formal steps that must be taken and the number of petitioners that must be secured in order to place a public policy question on the ballot under authority of an Act of the General Assembly, approved May 11, 1901, entitled, "An Act providing for an expression of opinion by electors on questions of public policy at any general or special election."

Section 1 of said Act provides as follows (Cahill's Revised Statutes 1923, Chapter 46, Paragraph 461):

"That on a written petition signed by twenty-five per cent of the registered voters of any incorporated town, village, city, township, county or school district, or ten per cent of the registered votes (voters) of the State, it shall be the duty of the proper election officers in each case to submit any question of public policy so petitioned for, to the electors of the incorporated town, village, city, township, county, school district or State, as the case may be, at any general or special election named in the petition: Provided, such petition is filed with the proper election officers, in each case not less than sixty (60) days before the date of the election at which the question or questions petitioned for are to be submitted. Not more than three propositions shall be submitted at the same election, and such proposition shall be submitted in the order of its filing." (Italics ours.)

We are informed by the Election Commissioners that the total number of registered voters in Chicago (revision of October 18, 1924) is 1,064,895; twenty-five per cent of said number is 266,224.

In order therefore to have a question of public policy under the statute aforesaid placed on the ballot at the present time or at any time before the next revision of the registration lists, there must be presented to the Board of Election Commissioners, sixty days before the date of the election at which said question is to be submitted, a petition signed by not less than 266,224 of the registered voters of the City.

Very truly yours,

C. M. DOTY,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Broadway System of Sewers—Review of Situation From the Initial Proceeding to Date.

December 23, 1924.

HON. JOSEPH O. KOSTNER, Chairman, Committee on Local Industries, Streets and Alleys.

Dear Sir:

In your letter of recent date you stated that your committee desired to be informed concerning the present status of the Broadway Sewer contract, the liability of the City for damages if the work is not prosecuted, and what fund would have to supply the money for the payment of the judgment for damages if one was secured. You state further that your committee wishes a full and definite opinion. In response to this request we submit the following:

The Board of Local Improvements submitted its recommendation, estimate and ordinance for what has been spoken of as the Broadway Sewer System on June 30, 1920 (Council

Journal, pp. 729-736). The ordinance was passed on November 24, 1920 (pp. 1128-9).

The contract was awarded October 16, 1922, to the White Construction Company for the sum of \$2,386,000. It appears to have been signed as of October 28, 1922. We know of no irregularity in the awarding of the contract, but have made no special investigation in regard to this. We have not, in fact, made any independent investigation as to any of the matters which do not appear in the Council Journal that are set forth as facts herein, but have assumed that the letters we have received and the word sent to us from time to time concerning such facts stated them correctly.

The assessment which was spread for this improvement, as confirmed in court, was \$1,802,000. There was a recommendation, estimate and ordinance for a supplemental assessment prepared for the sum of \$700,000 after a public hearing, but a majority protest having been filed, the matter was held in abeyance for a year as provided by statute.

The ordinance for this supplemental assessment has not been passed. It was presented to the City Council on October 18, 1922 (pp. 1066-1068), and ordered filed on November 22, 1922 (p. 1354). On the same day a resolution was presented requesting the Board of Local Improvements to make application to the County Court of Cook County, to vacate all orders theretofore entered and to dismiss the petition for the confirmation of the assessment (pp. 1362-3). At the same time an order was passed directing the Board not to start work pending the disposition of the matter before the Committee on Streets and Alleys (p. 1362). The resolution was passed on December 6, 1922 (p. 1491). It should be noted that this was after the close of the term of court at which the judgment of confirmation was entered.

The public meeting on the proposed supplemental assessment was held on October 13, 1922. The Board decided to proceed with the work, and the contract was let almost immediately thereafter. While undue haste may have been displayed, there was nothing contrary to law in that. Under

Section 56 of the Local Improvement Act the City has the right to dismiss its proceedings upon a proper showing, but this right is limited by the following proviso:

“Provided, that after the contract for the work shall have been entered into, or the bonds mentioned in this Act issued, no judgment shall be vacated or modified or any petition dismissed at a term subsequent to that at which the judgment was rendered, nor the collection of the assessment be in any way stayed or delayed by the council or board of trustees, or board of local improvements, or any officer of the municipality, without the consent of the contractor and bondholder.”

The term of court having gone by at the time the Council requested the Board by resolution to dismiss the proceedings, it would have been necessary for the contractor to consent to the dismissal. In any event there was no obligation on the part of the Board to dismiss, since even the City Council cannot direct it to do so and cannot repeal an ordinance providing for an improvement except on recommendation of the Board. Hence, the contract was valid, unless some irregularity in the bidding, collusion, or other illegal act could be shown. After the present Board of Local Improvements took office, the president ascertained that permits for the work from the Superintendent of Streets and Superintendent of Sewers had been taken out by the White Construction Co. Since no work was being done, it occurred to him that the permits should be revoked, and he addressed a letter to this department asking whether these permits could legally be cancelled.

It appears that when this letter was considered by the Attorney for the Board of Local Improvements he was not informed that there had been a protest filed by a majority of the property owners and that thereby there had been an automatic suspension of the work. His letter under date of August 23, 1923, holds that the permit from the Bureau of Sewers could be lawfully revoked, because it required the work to begin on a specific date which had passed, while that from the Bureau of Streets could not be revoked because it only

specified when the work should be completed and that date had not yet arrived.

After passing on the status of the permits, the writer of that opinion stated that there was another aspect of the case which he would consider, and he called attention to a provision in the contract which said that the work was to be commenced on or before November 7, 1922, and to progress regularly and uninterruptedly after that, etc. Then he went on to say that these requirements were of the essence of the contract and that the failure on the part of the contractor to observe and comply with them constituted a breach of the contract. Then he said that if the City of Chicago had not expressly or impliedly extended the time of the contract it had the right upon service of proper notice upon the contractor to cancel and terminate the contract. He finally concluded by saying that he did not profess to be conversant with any facts that may have transpired subsequent to the letting of the contract bearing upon or explaining the delay on the part of the contractor in commencing the work, and that if such delay was not assented to by the City and not occasioned by an act of omission or commission on the part of the City, the contractor was in default.

That opinion having been written on the assumption that nothing had transpired which affected the status of the contractor or excused his default, it was, of course, subject to reversal when his attention was called to the fact that there had been a remonstrance petition filed which, under the statute, deferred the work for a year.

At a later date (June 16, 1924) the President of the Board of Local Improvements sent a letter to the Department of Law in which he stated that he had received a copy of a ten-page letter addressed to the Corporation Counsel from the attorney representing the White Construction Company. This letter contended that the contract could not be cancelled because the whole proceeding had been automatically held up by reason of the filing of the remonstrance petition.

In reply to the last letter of the President of the Board of Local Improvements a new opinion was written in which it was stated that at the time the former opinion was given the text of the original contract was placed before the writer and the contents of that instrument were the only facts he had upon which he could base his opinion. The circumstances in the case were then reviewed at some length, and then it was stated that a matter of very great importance bearing upon the contract had not been disclosed when the former opinion was asked for, and that this was the important fact that on November 13, 1922, a remonstrance petition was filed with the Board of Local Improvements under the authority of Paragraph 3 of Section 8 of the Local Improvement Act. It was further stated that a remonstrance petition automatically stays all proceedings therein for a period of one year; that it was sometimes contended that such a petition has no legal effect in the matter of a supplemental assessment; that the Supreme Court had never directly passed on that point but that there seemed to be ground for holding that whenever a public hearing is necessary property owners have the right to file a remonstrance petition. The latter opinion then went on to say that after a careful consideration of the contract, taken in connection with the fact that such a petition had been filed, the filing of the petition and the failure of the City Council to pass the ordinance for the supplemental assessment was sufficient to excuse the contractor for the apparent delay on its part in entering upon the work. It was further stated that while the opinion of the attorney for the contractor asked that the opinion of August 23, 1923, be reconsidered and withdrawn, this should not be done because the opinion was based on facts as they had been presented at that time, and it was not a question of reconsidering the opinion but of giving a new one based upon facts that were called to the writer's attention for the first time when the latter opinion was written.

The last opinion then concludes by saying that the White Construction Company may have been negligent on account of its failure to commence operations prior to November 7.

1923, but that if so no facts have been placed before the Corporation Counsel which indicated any specific acts of negligence, and closed with the statement that it was extremely doubtful if the City could successfully maintain that there was a breach of contract because the City Council had failed to provide for the supplemental assessment.

There does not appear to be anything inconsistent or conflicting in the two opinions of which we speak. The first was based on a state of facts presented that left out an important element and carefully stated that the conclusions arrived at were based on the fact that he knew of no circumstances which excused the delay of the contractor. The second opinion took into account the fact that there had been an automatic postponement of the whole matter and a failure on the part of the City Council to provide the necessary funds. This is the way the matter stands now. There may be still other facts to be presented which would indicate whether or not there was some dereliction or default on the part of the contractor, but unless that can be shown the contract is still in force.

It has been intimated that the Corporation Counsel has held that the City is bound to pursue the work and permit the White Construction Company to do it. This by no means follows from what has been said. In the first instance, it may be that after studying over the situation and getting all the facts and details which we have not up to the present time made any attempt to secure for ourselves, we will find something that will be a cause for rescinding the contract. In the next place, if the City refuses to allow the White Construction Company to proceed, the latter's only recourse is a suit for damages. How successful it would be is problematical, but it would at least be difficult for this company to show the extent of the damage if there was not actually any work done by anyone which would form a basis for a proper computation. In other words, it would be hard to estimate the damage merely from figures as distinguished from actual operations. Finally, there is still the legal question undetermined which we have hinted at concerning the necessity for deferring the

work in the case of a remonstrance to a supplemental assessment. Hence, there is no such thing as the City being compelled to let this contractor proceed, if it is the desire of the City Council to take its chances on rescinding the contract and being sued for breach of contract.

In answer to your last question as to the fund from which a judgment would have to be paid in case damages were allowed, there is no such thing as holding the judgment down to a particular fund. In other words, you could not depend on the fund raised by special assessment for this purpose, since the money so raised would either have to be put into the improvement or returned in the shape of a rebate. A judgment against the City runs against it generally except in cases where it arises from a legitimate expense of some particular fund. Damages are not in the nature of legitimate expenses, but are the result of some fault or failure which is entirely outside of the legitimate expenses for which a fund is set apart. There are cases, of course, where a judgment can be and must be paid out of some particular fund, but that is where work is done or material is furnished which is properly chargeable to said fund. Consequently, it is more than likely that whatever judgment is secured would have to be defrayed out of the General Corporate Fund or out of some bond fund that might be created later on to take care of judgments.

Yours very truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

(Note: See earlier communications on the same subject, the first in the preceding volume of opinions, under date of August 23, 1923, the second and third, *supra*, under dates of June 19, 1924, and December 4, 1924.)

**Sale of Site of House of Correction to County for
County Jail and Criminal Court Building.**

Chicago, December 26, 1924.

HON. JOSEPH R. NOEL, Chairman of Commission on Proposed
Cook County Jail.

Dear Sir:

Your letter of recent date, addressed to the Mayor, was referred by him to the Law Department for reply. You inquire therein whether there is any legal obstacle which will prevent the sale of the House of Correction site to the County of Cook for purposes of a County Jail and Criminal Court Building.

The City of Chicago acquired the House of Correction and the site whereon it stands under authority of the statute empowering cities to establish such institutions. This act contains a number of provisions with respect to the government and maintenance of the House of Correction, but none of these indicates that the property stands on any different footing from other real estate owned by the City that is used for public purposes. One of these provisions is to the effect that the Board of Commissioners of the County "shall have full power and authority to enter into an agreement with the legislative authority of such city, or with any authorized agent or officer on behalf of such city, to receive and keep in said house of correction any person or persons who may be sentenced or committed thereto," etc. (Cahill Rev. St., Ch. 67, Sec. 8.) We do not, however, regard this as having anything to do with the ownership or alienation of the property.

It is our opinion, therefore, that the same rule as applies to the sale of any other city real estate will govern the proposed transfer to the County of Cook. The rule is that in the absence of a clear grant of power from the Legislature real

estate owned by the City and devoted to a public use cannot be sold. (See *Palmer v. Albuquerque*, L. R. A. 1915A, 1106; *Douglass v. Montgomery*, 43 L. R. A. 376.) The Legislature, however, has given authority to the City to dispose of such property by sale when it is no longer necessary or useful to, or its longer retention for the best interests of the city. (Cahill, Rev. St., Ch. 24, Par. 648 *et seq.*)

This special statute prescribes a fixed routine for the sale of real property by the City, and the method thus prescribed must be followed. As stated by one writer:

“If the charter or constituent act of the corporation prescribes a particular mode in which the property of the corporation shall be disposed of, that mode must be pursued.”

Dillon on Mun. Corp., 5th Ed., Sec. 994.

The statute in the present instance authorizes the City Council, by ordinance passed by a three-fourths vote at a regular meeting or at a special meeting called for the purpose, “to sell such property when the same shall, in the opinion of such majority * * * be no longer necessary, appropriate or required for the use of such city * * * or profitable to, or its longer retention be for the best interests of, such city.” Then the statute gives provisions which specify the procedure, as follows:

“Such ordinance shall specify the location of such real estate, and the use thereof, and before any sale shall be made under or by virtue of any such ordinance, by the city council of any such city, or the board of trustees of any such village, such proposal to sell shall be published in one of its daily or weekly papers once each week for four successive weeks, the first publication to be not less than thirty days before the day provided in said notice for the opening of bids for said property. Such notice shall contain an accurate description of such property, the purpose for which it is used, and at what meeting the bids will be considered and opened, and shall advertise for bids therefor. All such bids shall be opened only at a regular meeting of such city council or board of trustees, and shall be accepted only upon a vote of three-fourths of the members of such city council or

board of trustees: *Provided, however,* that the city council or board of trustees may, by a majority vote, reject any and all bids."

The statute then states that, upon the bid being accepted, "and the purchase price duly paid or secured," the property may be conveyed by deed "to such party or parties whose bids have been accepted," the deeds to state the price paid therefor.

This department has been disposed in the past, when occasions have arisen where a transfer of property no longer useful to the City was to be made to some other municipal corporation, either by way of sale or exchange, to take the liberal view that this statute was intended to protect the public, and that where the contemplated transfer was to another public corporation only the forms need be gone through with. Such view, or interpretation of the statute, has not always met with approval on the part of the attorneys representing the county or the school board, as the case may be, and we do not feel that it should in the present instance be pressed on our part. We come to this conclusion for two reasons, first, because it would be hard for the City Council to make the declaration as to the property no longer being useful to the City, and second, because the proceeding prescribed by statute would have to be followed with greater formality than on similar occasions where we have urged a liberal construction of the statute on account of the fact that bonds would have to be issued. The way would be open for an attack on these bonds if they are issued for the specific purpose of buying this property, and the matter might have to be passed on by the courts before any good title could be given.

In order to make ourselves perfectly clear on the subject, we give it as our opinion that we do not see any insuperable obstacle in the way of making the proposed transfer, but we consider it necessary to follow the procedure set forth in the statute. The City Council will have to make its declaration by a three-fourths vote, the property will have

to be advertised, a bid or bids will have to be made and presented to the City Council, and that body will have to accept the bid and order the conveyance by a three-fourths vote.

With regard to the bonds to be issued by the County, the validity of these will not necessarily be affected by the failure of the deal, unless they have been issued in such a way that they were limited to this particular site. Therefore, we see no reason why the Board of Commissioners of Cook County may not proceed in the preliminary work of arranging for placing the proposition to issue bonds for the purposes of a County Jail and Criminal Court building on the ballot.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Acquisition and Operation of Small Bus Line by City.

December 27, 1924.

HON. THOMAS F. BYRNE, Alderman, 15th Ward.

Dear Sir:

We beg leave to reply to your letter in which you ask us to advise you, "if it would be within the law for the City of Chicago to finance and operate the three privately owned buses now being operated at the west end of Archer avenue from Cicero avenue to 72d avenue, and to provide and operate one additional bus in this section." We understand you to refer to the buses now being operated by the Fifteenth Ward West End Improvement Club for the transportation of the members of that Club.

The operation of motor buses by a club or society solely for the transportation of the members thereof is not legally different from the act of one who maintains his own vehicle and cares for his own needs for transportation. If no offer is made to the public to carry for hire such persons as may offer themselves as passengers or to furnish transportation to the public generally, the operation of such privately-owned buses does not constitute a public utility and is not subject to the requirements and limitations placed by law upon public utility businesses. As we understand the facts, the operation of buses by the Fifteenth Ward West End Improvement Club is to supply transportation service to the members of that Club only, and falls within the class of private operations described above.

If the same buses should be operated by the City of Chicago for the transportation, for hire of any and all persons who may offer themselves as passengers, such operation of said buses would undoubtedly amount to municipal ownership and operation of a public utility. That only a few buses might be operated over a single short route for the benefit of persons living in a limited community would not affect the legal nature of such bus operation.

Under the Municipal Ownership Act of 1913 the City of Chicago, subject to the provisions of said act, may acquire and operate any public utilities in Chicago the product or service of which or the major portion thereof is to be supplied to the City or its inhabitants. Any exercise of the powers conferred on the City by said act is, however, subject to a referendum vote of the people and it would seem, therefore, to be impracticable to invoke such powers for the acquisition and operation of a public utility serving only a small and limited section of the City.

The right of the City under said Municipal Ownership Act to acquire and operate motor buses for the carriage of passengers for hire was fully reviewed in an opinion of the Law Department dated August 22, 1922, a copy of which is hereto attached.

Except as in said Municipal Ownership Act provided, we are of the opinion that the City has no power to acquire, own and operate motor buses for the carriage of passengers for hire whether the number of buses so operated be great or small, or the territory served be wide or limited. .

Very truly yours,

C. M. DOTY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Accounts in Appropriation Bill and Grouping of Items.

December 30, 1924.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

In your letter of recent date you mention the fact that there are a number of items usually appropriated for under accounts commonly known as "S" Accounts where the wording is rather lengthy. You express a desire to condense these items, including in the first part of the appropriation ordinance a section which explains fully and definitely what the items are, and then let the individual items merely read, "For other expense of operation and administration as per section ..." You ask us whether there would be any objection to making the change so outlined.

We do not think there will be any serious objection to making such a change, provided the list of items under Division 2 which include the expenses for operation and adminis-

tration that you desire to group in this way were divided between personal services and those services which are of an impersonal nature.

It is always a target for the tax objectors when there is an attempt at grouping. Under the former manual which was in vogue for a long time the grouping was between personal services and impersonal services and benefits. This was attacked and we had some difficulty with it, but the Supreme Court sustained us. The following excerpt from the decision will explain the whole situation:

“The appropriations for many of the departments, bureaus and divisions contain items ‘for personal services’ and ‘for impersonal services and benefits,’ and the objection is made that these items are illegal because they do not specify the several objects and purposes or the amount required for each object and purpose. Section 3 of the ordinance requires that ‘the comptroller, and the heads of the other departments, bureaus and offices of the city government, shall administer the amounts appropriated in this bill by standard accounts as specified by code numbers, designations of which may be amended or altered by the city comptroller to suit the needs of proper classifications and in accordance with the official manual of the department of finance, in which is specified the details of the commodities, services, benefits and claims chargeable to standard accounts, respectively,’ etc. This official manual was introduced in evidence and contains a classification of expenditures, including a schedule of commodities, services, benefits and claims alphabetically listed, and classifications to conform with standard accounts. Group ‘S’ refers to personal services other than by employes, and includes accounting expert, architectural services, artists’ services, auditing, draftsmen’s services, engineering services, expert services of various kinds, investigators, legal services, medical and surgical services, photographing services, and numerous other similar items. Group ‘T’ refers to impersonal services and benefits, and includes express and freight, livery service, railroad transportation service, telegraph and telephone service, insurance premiums, court costs, court reporting, meals for jurors, prisoners and witnesses, hospital services, laundry services, pasturing, plowing service, and other similar items. They are all expenses of a kind

which the city might properly incur, and are of such a character that the amount of each could not be accurately foretold and a minute subdivision of them could not reasonably be made. Many of them are miscellaneous and contingent services and expenses, which can be provided for in advance in no other way than by a general estimate and appropriation. The purpose of these appropriations was sufficiently indicated by reference to the manual of the department of finance."

People ex rel. Stuckart v. Arnold Bros., 282 Ill. 305.

You will see from the above that we have absolute authority for the division that existed before, and that the court specifies as the distinction between the divisions the fact that one relates to personal services and the other to impersonal services and benefits. We see no reason for starting a new discussion on a matter of this kind, which has already been decided. Therefore, we suggest to you that if you put in such a section as you have arranged for it should be done in such a way that the personal services are separated from the other items. We might say incidentally, that this department never gave its sanction to grouping this whole list as a Division 2 appropriation. When the items under Division 2 were placed in the code the understanding that we had was that they would be specially appropriated for. Since the practice has been made of grouping the whole lot this way, we have offered no objection up to this time, but if you specify in the appropriation bill itself what these various items are, we advise you to take the precaution that we suggest.

Yours very truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Incurring of Expense and Creation of Bond Fund Prior to Appropriation by City Council.

December 30, 1924.

HON. JOHN J. SLOAN, President, Board of Local Improvements.

Dear Sir:

In response to your request for the draft of an ordinance which will make available immediately \$3,500,000 for payment for the property taken and \$1,500,000 for construction account from the proceeds of South Water Street Bonds, we have drafted an ordinance providing for the use of such money for the purposes required, and we submit same herewith.

Section 3 of the ordinance authorizing the bonds in question (see Council Journal, May 7, 1924, p. 2937) reads as follows:

“Section 3. No part of the proceeds of the bonds hereby authorized shall be expended unless and until there has been an appropriation therefrom duly made by the City Council prior to such expenditure, stating the specific object or purpose for which the same is to be expended.”

The Annual Appropriation Bill for the Year 1925 will not be passed for some time, but it has been held by our Supreme Court that the City Council may lawfully authorize the incurring of expense during the first quarter of the fiscal year prior to the passage of the appropriation bill and provide the necessary appropriation therefor when it passes such appropriation bill. (*City of Danville v. Danville Water Co.*, 180 Ill. 235.) While the section of the ordinance above quoted says that the money shall not be expended unless and until an appropriation has been duly made therefor, we believe that such an ordinance as we have prepared authorizing the expenditure satisfies the requirement set forth therein.

The comptroller made inquiry a long time ago concerning his right to advertise and accept bids for the bonds prior to the date of their issuance for the sale of same immediately after such date, and was advised by us that it could be done. We assume, therefore, that the bonds will be sold as soon after January 1, 1925, as practicable, and that the money will be available upon the passage of this ordinance or soon thereafter.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Settlement for Incumbrances on Land Due to Delinquent Special Assessments.

December 31, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

You forwarded to us a copy of a letter addressed to the Finance Committee by one Taylor A. Snow, in which he offered by way of settlement to the City for tax deeds and other charges which have accrued against certain property the original face amount of the assessments without any interest. You state in your letter that such offer amounts to the sum of \$4,474.82, but you attach schedules which indicate that the amount due the City is far in excess of \$10,000. You state further that this offer of settlement is on such an unusual basis that it could be justified only on the ground that the assessments could not be sustained if attacked in court.

Since it is the policy of your department to refuse settlement of this kind unless the property is over-burdened with

delinquent taxes and assessments, or it is advised to do so by the Law Department, you ask whether we would advise in the present instance such settlement as is proposed.

There are some features about the case which would make us feel that a reasonable allowance should be conceded, but we are not disposed to recommend a settlement on the basis suggested for the reasons that we give below.

The point on which Mr. Snow bases his case lies in the fact that apparently a strip running through a subdivision created at the place where the property lies leaves eight lots outside of the dedication that was made when the streets and alleys were laid out. The City's Map Department had refused to approve a plat that was submitted until the strip of land containing these eight lots had been included, so that the streets and alleys would pass through to the next subdivision. In order to do this, the party who was making the subdivision secured a quitclaim deed, had the same surveyed and platted, and the subdivision was then accepted as a proper one by the City. It is claimed by Mr. Snow that the grantor in the quitclaim deed never had color of title to this strip.

The chief reason why we believe the City ought to contest this case is that it ought not to yield readily on questions of this kind. If we concede points of this character on the strength of someone claiming that parties have not acquired proper title when subdivisions were made, many cases of this kind would undoubtedly arise. In the instant case there is additional reason for refusing to concede it because the City authorities had really compelled the acquisition of the property by refusing to approve a subdivision without it, and the City would be placed in the peculiar position now of repudiating what it had itself required.

You ask us to say what the legal status of the special assessments on this property is. That would be difficult, because there are close questions involved. But on this point we call your attention to the fact that the Chicago Title & Trust Company, in passing on the title in its opinion to Mr. Snow, has listed these special assessments, and seems to re-

gard them as liens on the property. Moreover, there are cases pending now involving the question you ask, and it is by no means certain that they will be decided in such a way that the special assessments would be rendered nugatory. The proceedings are pending on bills in equity, and the City has the right at least to show that the party who is seeking to annul the assessments has benefited by them and is bound to pay as much as he is offering, if not charges and interest that the City aims to collect from him. That he has benefited by the subdivision and has profited by the improvements that have been put in is evidenced by the fact that he is willing and offers at this time to make a re-dedication or confirmation which will leave the physical status as it now is. Under these circumstances, we do not feel justified in recommending a settlement on the basis that is proposed.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Use of Taxicab Service by City.

Chicago, January 3, 1925.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

Your letter of the 2d instant, concerning use of taxicab services by City departments, speaks of the contract with the Central Auto Service Company for automobile service for the various City departments (see Council Journal, December 23, 1924, pp. 4311-12) as possibly precluding the use of taxicabs. You state that one of the heads of departments indi-

cated that such taxi service would in a great many instances meet his requirements at a saving to the City, and you ask whether you can provide in the appropriation bill for the use of taxis from established companies at regular taxi rates.

There is nothing in the law which will prevent the City Council from making provision for taxicab service if it sees fit. Nor is there anything in the contract with the Central Auto Service Company which in any way interferes with the right of the City to employ others for purposes of passenger transportation. If the contract stated that the automobile service contracted for was to include all such service required by the City, there might be some question. But the contract for the year 1924 does not contain such a provision of exclusive service, and there is nothing in the order of the City Council of December 23, 1924, which calls for such a contract for 1925. The portion of the 1924 contract which bears on the question you ask reads as follows:

“That the said party of the first part for and in consideration of the payments to be made by the City of Chicago as hereinafter set forth, hereby agrees to furnish all such automobile service to the said City or its officers, or employes and to the Board of Election Commissioners of the City of Chicago, as may be ordered by the Business Agent of the City of Chicago or by the Chief Clerk of the Board of Election Commissioners of said City during the period from January 1, 1924, to, and including, the 31st day of December, 1924.”

You will note from the above that there is no greater inhibition against the use of taxicabs when required by the City's officers or employes than there is against the use of street cars, buses, or other means of transportation.

Yours truly, .

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Liability of City for Damages from Burst Water Main.

January 5, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Your letter of December 29, 1924, addressed to the Corporation Counsel requesting an opinion as to the liability of the City of Chicago for damages resulting from the freezing and bursting of a temporary water main in front of the premises known as 301 South Water street, has been referred to the undersigned for consideration and reply.

From an investigation of the circumstances out of which the question of damages arises, it appears that the City of Chicago, pursuant to certain judgments heretofore rendered in a local improvement proceeding and in a condemnation proceeding brought under the provisions of the Local Improvement Act, is proceeding to demolish buildings on the north side of South Water street and is excavating the street for the purpose of establishing a new street grade as contemplated in what is known as the South Water Street Improvement.

In establishing the new street grade, it appears to have been necessary to discontinue and demolish the old water main, and in order to provide uninterrupted water service to the property owners on the south side of Water street a temporary water main has been constructed above the sidewalk and next to the building for the purpose of supplying water to the premises in question.

During the severe cold weather prior to December 22d this water main froze and burst, thereby shutting off all water supply to the premises in question, and the claim in the instant case is for damages for failure to supply water as heretofore.

The owning of water works and the furnishing of water by a municipal corporation to its inhabitants for profit, is an undertaking of a purely private nature. The duties exacted from a municipality under such circumstances are the same and the liabilities imposed upon it are the same as those imposed in a case of private corporation or individual engaged in the same enterprise. They are bound to exercise due care and skill in constructing and maintaining mains for the distribution of water, but they are not insurers of the safe condition of property, and, consequently, are not liable for injuries that could not have been prevented by the exercise of due care and vigilance. The negligence in such cases might be said to be the omission to do that which should have been done by those who, because of their experience and knowledge, were entrusted with such responsibility, or the doing of something by them which should not be done, being contrary to reasonableness or the usual, customary and ordinary manner of doing it.

In the case of *Selz, Schwab & Co. v. City of Chicago*, 202 Ill. 545, the court, at page 549, said: "There were no facts stated from which the law would imply a duty of inspecting the pipes laid deep in the earth below the streets, or any facts showing for what reason an inspection would or could be necessary. Judging from the facts stated in the count, an inspection of mains and pipes under the streets would be impossible, and if there were any facts showing the necessity or propriety of such inspection, they should have been alleged."

In the case of *Terry v. The Mayor*, 8th Bosworth, 510, the court said: "No one is responsible for injury committed by their breaking unless caused by negligence or design. If all due diligence is used in making or maintaining the pipes the injury becomes an unavoidable accident for which no one is responsible. There is no evidence that the pipes were originally defective. As they were in long before the damage in this particular matter, they must have been originally strong. * * * If the pipes were originally sound there

was no proof of want of care in repairing any known defects or discovering them. Neglect is not to be presumed any more than fraud, except in cases where the policy of the law places the burden of discovering it upon the party."

The mere bursting of a water pipe is in itself no evidence of negligence on the part of a municipality. The City is not required by law to so construct its water mains that accidents are impossible. All that is required is to use ordinary care to keep its water mains ordinarily safe under all circumstances. What is ordinary care is a question of fact to be determined from the circumstances of the particular case.

In the present instance it appears that the City, through its proper officers, undertook to disturb an existing water main and to provide temporary service through temporary pipes above ground, practically unprotected at a time of the year when it knew or should have known that such water service could not be maintained without the exercise of particular care in protecting such temporary main from frost. The City, desiring to proceed with the work of the contemplated improvement, assumed the consequences resulting from the work performed in making such improvement.

The situation in the instant case is such that we believe it advisable and to the interest of the City that an amicable adjustment be made of the claims arising by reason of the bursting of the temporary water main in question.

Respectfully submitted,

ROY S. GASKILL,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Laying Water Main in Strip of Land Which Has Not
Been Dedicated as Public Street.**

January 7, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir :

You have advised this department that the Water Pipe Extension Division of the City of Chicago is planning to lay a forty-eight inch water main approximately 7 feet W. E. L. California avenue (produced), and you desire to be advised of your legal rights in proceeding with this work. California avenue, as you state, has never been dedicated as a street between 48th street and a point 814 feet south. On June 30, 1913, the records of the Map Department show that the ordinance was passed for the opening of California avenue between 47th and 51st streets, but this proceeding was later dismissed. On June 3, 1918, a similar ordinance was passed by the City Council providing for the opening of California avenue between these streets. The Board of Local Improvements filed a petition for condemnation in the County Court, but the records of the Board of Local Improvements show that in 1920 this proceeding was ordered deferred, and nothing has been done since that time.

The information given by the Board of Local Improvements is that this proceeding was objected to by the Grand Trunk Railway Company, the Indiana Harbor Belt Railroad, and the Chicago Junction Railroad, which maintain tracks which cross what would be California avenue in the vicinity of 48th street. The property owners, on the other hand, desire the opening of the street.

The records of the Board of Local Improvements also show that sewer pipes have been laid from 47th street to 48th

place, and from 51st street to 50th street, on California avenue extended. You state in your communication that since October, 1898, the City has maintained a twenty-four inch water main in this property. Apparently, the water main and sewers were placed on this property without any right so to do. Although a question of law arises as to whether the City has acquired a prescriptive easement to maintain water mains in this property, it is our belief that the safest procedure is for the City to acquire an easement from the property owners to lay the forty-eight inch main. Since the property owners desire these improvements, there should be no difficulty in obtaining their signatures to such an easement. We have been given to understand that the railroad companies are no longer opposed to this improvement.

There is attached hereto a form of easement which is used by the Board of Local Improvements for acquiring rights to construct sewers or water mains. It is our suggestion that you acquire the signatures of the property owners and the railroads to such an easement, using the form herewith provided, and then proceed to lay the forty-eight inch main.

Although the condemnation proceedings for the extension of the street have not been dismissed, there is no telling when further action will be taken, and we consider it advisable for you to proceed, by acquiring an easement, as aforesaid, rather than by waiting for the consummation of the proceedings for condemnation.

Respectfully submitted,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Auctioneer's Licenses—"Person" Does Not Include
"Corporation"—Issuance to Corporation
or Partnership.**

Chicago, January 8, 1924.

HON. THOMAS P. KEANE, City Collector.

Dear Sir:

You ask a series of four questions relating to auctioneers' licenses, which we will answer in the order they are asked.

We first reply, however, to that part of your letter which calls attention to Section 1003 indicating that bodies corporate may be included under the designation "person." Your impression in respect to this is right, and the omission of the words "firm or corporation" after the word "person" does not ordinarily preclude a firm or corporation from getting a license. It is only when the privilege is distinctly shown to be personal by the context that the other rule prevails.

The fact that you assumed that it was proper to issue auctioneers' licenses to firms or corporations was only natural, since you had not been advised in regard to the matter.

You will see, however, by referring to the chapter relating to auctions and auctioneers that the whole chapter is designed to operate so as to confer a personal privilege on the licensee and one other person that he may name.

Having explained this, we will now take up your questions in the order in which you gave them to us. Your first question is, whether an auctioneer's license may be issued in the name of a corporation. Our answer to this has already been given. That is to say, the ordinance clearly indicates that an auctioneer's license is to be regarded as a personal privilege.

Your next question is, whether a license may be issued in the name of a corporation but designating the individual auctioneer, thus, United Auction Company, Inc., John Doe, Auctioneer. We see no particular objection to such a procedure as this, if parties prefer to have a license issued in this way. Our belief is that it would be more to the advantage of a corporation to have a license issued in the individual name, since in case of revocation it could substitute another auctioneer in the place of the one whose license was revoked. That, however, is entirely within the control of the parties asking for the license. If they prefer to have their corporate name appear with the name of the auctioneer distinctly specified along with the corporate name, that may be done. If done this way, however, the names of the officers of the corporation should appear just the same as the names of partners are required to appear in pursuance of Section 223.

Your third question is, whether an auctioneer's license may be issued in the name of a co-partnership, as "Charles Brown and Sam Green, doing business as Brown & Green." We do not believe that the ordinance contemplates such a designation of the license. The person who seeks to have the auctioneer's license should make an application, and such license should be issued in his name, and he should file his statement showing who his partner or partners are, as required by Section 223.

Your fourth question, with relation to a co-partnership, is practically the same as your second question as applied to a corporation, and may be answered in the same way. We see no objection to the license stating that it is issued to "Charles Brown and Sam Green, a co-partnership, Charles Brown, Auctioneer." Matters may arise which may make it to the advantage of the co-partners to be able to show that they were interested in the license, and there is no occasion for depriving them of this, as long as the license shows positively who is the auctioneer thereunder.

These very precise requirements in the case of auctioneers arise from the fact that this is a business which is pecu-

liarily within the police powers, and some person must be held responsible for unlawful acts. The City's remedy in the case of a corporation would not be so expeditious.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Boxing and Wrestling Exhibitions.

January 8, 1925.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

You have requested an opinion relative to the proposed athletic entertainment to be held at Wicker Park Hall, 2046 West North avenue on Wednesday evening, January 28, 1925, and you have attached a communication from Alderman Edward J. Kaindl of the 34th Ward relative thereto.

Alderman Kaindl states that this is "an athletic entertainment in which members only will participate and attend." Any form of athletic entertainment and exhibition is permissible except boxing exhibitions, which are prohibited by statute, and wrestling matches, which are regulated by The Chicago Municipal Code. The Criminal Code provides (Section 493 of Chapter 38 of Cahill's Illinois Revised Statutes for 1923) as follows:

"Whoever instigates, carries on, promotes or engages in as a witness, any sparring or boxing exhibition, shall be fined not exceeding \$500 or confined in the County Jail not exceeding six months."

It will be observed that the aforequoted statute makes no exception whether the boxing exhibition is open to the public or is only carried on by members of an association.

With regard to a wrestling match and other athletic exhibitions, The Chicago Municipal Code of 1922 provides for the establishment of an athletic commission, and makes it obligatory to acquire permission from such commission before holding an athletic exhibition. Section 199 of said code provides, in part, as follows:

“199. *License required for athletic exhibitions—application—fee.*) It shall be unlawful for any person, club, firm, association or corporation to give, hold, operate or maintain an exhibition of wrestling or of any other athletic matches or contests in the City of Chicago, unless a license has been issued for such exhibition as hereinafter provided, and unless the same is conducted in accordance with the provisions of this ordinance and the rules and regulations of the athletic commission; provided, however, that the commission shall adopt rules defining amateur and scholastic athletic contests, and providing for the exemption of exhibitions of the same from such provisions of this chapter as the commission deems necessary to prevent any undue interference with exhibitions of such contests.”

The Milwaukee-North-Robey Businessmen's Association has the right to conduct its athletic exhibition, after procuring a license as above set forth. If the above quoted statute or provision of the City Code is violated, it then, of course, becomes your duty to arrest for such violations.

Yours very truly,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Mechanic's Lien on Vehicle License Plates—Procedure to Establish Lien Against City.

January 9, 1925.

HON. JOHN A. CERVENKA, City Treasurer.

Dear Sir :

We have before us your letter with relation to notice of lien and a copy of written statement of claim which was served on you. Your question with regard to same is whether liability would have attached on account of payment if the same had been made before you received written notice, and also what legal effect the written notice has.

It seems that on January 6, 1925, there was a warrant in your possession which had been deposited in a bank and which had come to you in the regular course of business for payment. The warrant was payable to the order of Continental Metal Products Company, was for the sum of \$10,800, and was in payment of vehicle license plates that had been furnished to the City. While this was in your possession you received a message over the telephone from the office of Schuyler, Ettelson & Weinfeld to the effect that they were giving notice of lien against two warrants, one of which was the warrant in your possession, and that the verbal notice would be followed by a written notice later on. While the warrant was still in your possession a written notice was presented to you signed by Barney Ets Hokin, which was drawn up in a formal manner and sworn to before a notary. It recited, among other things, that the claimant made a statement under the law entitled, "An Act to revise the law in relation to mechanics' liens," approved May 18, 1903, as amended, and that it was for a mechanic's lien for material furnished the Continental Metal Products Company to be used for the manufacture of vehicle plates for the City of Chicago. The claim was for the sum of \$1,458.68 with in-

terest thereon at the rate of 6 per cent per annum from October 30, 1924.

The act under which the complainant seeks to secure a lien contains only one section that applies directly to contractors with the City. That is Section 23. The part of that section that we must necessarily consider in this matter reads as follows:

“Section 23. Any person who shall furnish material, apparatus, fixtures, machinery or labor to any contractor having a contract for a public improvement for any county, township, school district, city or municipality in this State, shall have a lien on the money, bonds or warrants due or to become due such contractor under such contract; *Provided*, such person shall, before payment or delivery thereof is made to such contractor, notify the official or officials of the county, township, school district, city or municipality whose duty it is to pay such contractor of his claim by a written notice; *and provided further*, that such lien shall attach only to that portion of such money, bonds or warrants against which no voucher or other evidence of indebtedness has been issued and delivered to the contractor by or on behalf of the county, township, school district, city or municipality as the case may be at the time of such notice.”

You will observe that no specific officer on whom a lien is to be served is mentioned in the statute. Consequently, if the lien attaches, the service of written notice on you would make it unsafe to pay out the money until there has been an adjustment in accordance with the provisions of the statute which follow that part which is quoted above. You will also observe, however, that the statute says that there must be written notice. Hence, anything paid out in case of verbal notice but no written notice would not create a liability.

In the present instance, however, we do not see how the lien could attach under any circumstances. The mechanic's lien law referred to is designed to give liens on work and material connected with the improvement of real property where private parties are the owners; and it is not possible to go far beyond that in the case of contracts for public im-

provements. We say this even though the courts are inclined to give a liberal construction to this section.

Thus, it has been held that the lien applies for lumber furnished a sewer contractor for shoring and bracing the trenches, for tracks for an excavating machine, for lumber and piping used in making but not entering into the improvement, for repairs on machinery and tools used, and for the rental of such machinery and oil and gasoline supplied for running it. (*Alexander Lumber Co. v. City of Farmer City*, 272 Ill. 264.)

After giving the section as broad an interpretation as is possible, we are still unable to say that the manufacture of license plates for vehicles constitutes such a public improvement as would be affected by the provisions of the mechanics' lien law. Therefore, although we would be disposed to advise against paying the money in any doubtful case after written notice had been served, we are constrained to say that in the present instance no lien could attach, and that the warrant may be paid notwithstanding what has transpired.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Service of Attorney's Lien Upon City.

January 9, 1925.

HON. MARTIN J. O'BRIEN, Comptroller.

Dear Sir:

Your communication addressed to the Corporation Counsel requesting an opinion as to the validity of a certain notice

of attorney's lien served upon you by Minnie H. May, executrix under the last will and testament of Albert W. May, deceased, informing you of her claim for lien against any moneys which may be due from the City of Chicago to one Archibald E. Freer, has been referred to the undersigned for consideration and reply.

The claim for lien involved, if valid, is necessarily based on the following statute:

"Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That attorneys at law shall have a lien upon all claims, demands and causes of action, including all claims for unliquidated damages which may be placed in their hands by their clients for suit or collection, or upon which suit or action has been instituted, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients, or, in the absence of such agreement, for a reasonable fee, for the services of such attorneys rendered or to be rendered for their clients on account of such suits, claims, demands or causes of action: Provided, however, such attorneys shall serve notice in writing upon the party against whom their clients may have such suits, claims or causes of action, claiming such lien and stating therein the interest they have in such suits, claims, demands or causes of action, and such lien shall attach to any verdict, judgment or decree entered or to any money or property which may be recovered, on account of such suits, claims, demands or causes of action from and after the time of such service of the aforesaid notice. * * *" Chapter 13, Paragraph 13, Section 1, Revised Statutes (Cahill), 1921, p. 233.

The foregoing was declared to be a valid enactment in the cases of *Standidge v. Chicago Railways Company*, 254 Ill. 524; *Burns v. Illinois Central Railroad Company*, 258 Ill. 202.

An attorney's lien is purely a creature of statute and the statute must be followed in order to establish it. Where notice has been duly served by an attorney as provided by the Attorney's Lien Act, the attorney becomes a part owner

of the decree in favor of the client and stands in the same position as if the client had assigned him an interest in the decree.

Dreyfuss v. Freud, 209 Ill. App. 345.

An attorney who has complied with this statute is entitled to a lien for his services.

Borg v. Kawin & Company, 190 Ill. App. 62.

In the case of *Baker v. Baker*, 258 Ill. 418, the court, at page 421, said:

“By serving the notice claiming a lien the attorney in effect becomes a joint claimant with his client in any judgment or decree that may be rendered or in the proceeds of any settlement that may be made by the client, and to the extent of the amount of his fee has the same interest in such proceeds, judgment or decree as his client and is entitled to his pro rata share thereof. In short, when the notice claiming a lien is served on the defendant or debtor under this statute it has the effect of an assignment of an interest in any judgment or decree that may be rendered or in the proceeds of any settlement that may be made by the client, and is such an assignment that the defendant or debtor is bound to respect. This creates a new and a substantial right in favor of the attorney and divests the client of substantial rights that he theretofore possessed.”

In *Standidge v. Chicago Railways Company*, 254 Ill. 524, the court, at page 534, said:

“Clearly it was the intention of the legislature to give attorneys a lien from and after the service of notice on the defendant, which would protect them against any settlements that might thereafter be made, regardless of whether the suit had been commenced, was pending or had been finally determined by the rendition of a judgment. The money paid by appellant to appellee’s client in settlement of this claim was money ‘recovered’ within the meaning of the statute.”

While a municipal corporation is not subject to garnishment process and cannot be harassed by litigation of that kind, yet it stands on the same footing as other corporations and

individuals with relation to the assignment of judgments or claims. Our attention has been directed to no statute or adjudicated case in this state holding to the contrary, and we have found none.

We are, therefore, of the opinion that any funds due the claimant, Freer, should be retained by you until such time as the rights of the lien claimant have been adjudicated, or the notice of lien withdrawn by the execution of a proper waiver thereof.

Respectfully submitted,

ROY S. GASKILL,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Duty of Health Commissioner to Execute Rules and
Regulations of State Department of Health—
Ban on Eating of Raw Oysters.**

January 13, 1925.

HON. HERMAN N. BUNDESEN, Commissioner of Health.

Dear Sir:

You have advised this office that the following rules and regulations have been ordered by the State Department of Public Health to take effect January 15, 1925:

“1. On and after January 15, 1925, no raw oysters shall be admitted into Illinois except there be filed in the Oyster Dealer's Office a Legal agreement that said oysters will either be shipped out of the State or that they will not be eaten *raw*. Provided that when the Dealer is not to be the ultimate dealer supplying the consumer he shall file an agreement made by the person to whom he sells that the Dealer will only sell to parties who agree

to exact a similar agreement; provided further that when the dealer sells to the ultimate consumer he agrees to exact a written promise from the buyer that said oysters will not be eaten raw. These agreements shall be kept on file and subject to inspection by the Health authorities.

"2. After said date no raw oysters shall be served or sold by any hotel, restaurant, eating house or railroad in Illinois.

"3. On and after such date it shall be illegal to eat raw oysters in the State of Illinois.

"4. Each local health officer of the State is ordered to inspect the premises of dealers in oysters and of Hotels, restaurants and eating houses to see that the law is enforced."

You have requested this office for an opinion relative to the procedure which your department should pursue in order to enforce the provisions of the above quoted regulations.

Section 2 of "An Act to create and establish a Board of Health in the State of Illinois," approved May 28, 1877, in force July 1, 1877, provides as follows:

"Section 2. The State Board of Health shall have the general supervision of the interests of the health and lives of the people of the State. They shall have supreme authority in matters of quarantine, and may declare and enforce quarantine when none exists, and may modify or relax quarantine when it has been established. The board shall have authority to make such rules and regulations and such sanitary investigations as they may from time to time deem necessary for the preservation and improvement of the public health, and they are empowered to regulate the transportation of the remains of deceased persons. *It shall be the duty of all local boards of health, health authorities and officers, police officers, sheriffs, constables and all other officers and employes of the State or any county, village, city or township thereof, to enforce the rules and regulations that may be adopted by the State Board of Health.*"

It will be observed that according to the italicized provisions of the above quoted portion of the statute, it is made your duty to enforce the rules and regulations of the State Board

of Health. This duty is also enjoined upon you by The Chicago Municipal Code of 1922, in that Section 1774 provides as follows:

“1774. DUTIES OF COMMISSIONER.) It shall be the duty of the commissioner of health to enforce all the laws of the state and ordinances of the city in relation to matters pertaining to the public health and the sanitary condition of the city, *to promulgate and enforce all rules and regulations of the board of health* or any other state or local authority with power to make rules and regulations concerning the public health, and to cause all nuisances affecting the health of the public to be abated with all reasonable promptness.”

The penalty for a violation of any of the rules or regulations of the State Board of Health is provided for in Section 7 of the State Board of Health Act, as follows:

“Section 7. Any person who violates or refuses to obey any rule or regulation of said State Board of Health shall be liable to a fine not to exceed \$200 for each offense or imprisonment in the county jail not to exceed (exceeding) six months, or both, in the discretion of the court. All prosecutions and proceedings instituted by the State Board of Health for violation of their rules and regulations shall be instituted by the board or by their executive officer, and it shall be the duty of the State's attorney in each county to prosecute all persons in his county violating or refusing to obey the rules and regulations of the State Board of Health. All fines or judgments collected or received shall be paid over to the State Treasurer and credited to the fund created for the support of the State Board of Health.”

We therefore advise you that the procedure to be followed by you should be as follows:

With regard to the first paragraph of the rules and regulations above referred to, you should require all dealers in oysters to forward to you the written agreement referred to in said section. These agreements should be kept on file in your office. With regard to the enforcement of the provisions contained in Sections 2, 3 and 4, the inspectors of your department should inspect hotels, restaurants, eating houses

and railroad dining cars within the City of Chicago for the purpose of ascertaining whether raw oysters are being served or sold. You are given the right to go upon any such premises for the purpose of enforcing the rules and regulations of the Health Department, by Section 1775 of The Chicago Municipal Code of 1922, which provides as follows:

“1775. POWERS OF COMMISSIONER.) For the purpose of carrying out the requirements of this chapter, the commissioner of health or anyone authorized to act for him shall be permitted at all times to enter into any house, store, stable or other building, and to cause the floors to be raised, if he shall deem it necessary, in order to make a thorough examination of cellars, vaults, sinks or drains; and to cause all privies to be cleaned and kept in good condition; and to cause all dead animals or other nauseous or unwholesome things or substances to be buried, removed or disposed of as he may direct.”

Whenever a violation is discovered of any of the rules and regulations above referred to, you should notify the State's Attorney of the same, and it is made his duty by Section 7 of the above quoted statute to prosecute for such violations.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Supplement to Preceding Opinion.

January 13, 1925.

HON. HERMAN N. BUNDESEN, Commissioner of Health.

Dear Sir:

Since the opinion was rendered to you relative to the procedure to be followed in carrying out the rules and regu-

lations of the State Board of Health forbidding the eating of raw oysters, you have advised this office that you have received an additional communication from the State Board of Health requesting you to place signs in restaurants, dining rooms and other places where foods are served, as soon as possible. These signs consist of cardboard placards, about 12 x 15 inches, on which is printed in black ink a warning from the State Board of Health against the danger of contracting typhoid fever from the eating of raw oysters, and calling attention to the rules issued by the State Board of Health relative thereto.

As we advised you in our former communication, the statute makes it obligatory for you to carry out and enforce the rules and regulations of the State Department of Health. The statute further provides, that in case the local health officer does not carry out and enforce such rules and regulations, the State Department of Health may step in and do so at the expense of the city or village. In view of these provisions it is our opinion that you have no discretion except to enforce the rules and regulations of the State Board of Health.

If such rules and regulations are clearly unreasonable and oppressive, and if no emergency exists which would justify them, you might be justified in ignoring them; however, we do not believe that the mere placing of signs in public dining rooms and kitchens containing a warning against eating raw oysters can be considered unreasonable or oppressive, especially in view of the recent epidemic of typhoid fever due to the eating of raw oysters.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Park Boards Must Comply With City Building Ordinances.

January 14, 1925.

HON. FRANK E. DOHERTY, Commissioner of Public Works.

Dear Sir:

You have advised this office that your department has issued a police order prohibiting further work on the addition to the Fernwood Park Field House, which is nearing completion, because the question has arisen as to whether or not the City of Chicago has jurisdiction over the erection of buildings and structures in Fernwood Park.

The Fernwood Park Board was organized under the Small Park Act of 1895, and is located within the territorial limits of the City of Chicago. The Small Park Act of 1895 does not purport to give the park districts any police power relative to fire and safety prevention in the construction of buildings. In the very recent case, *Cook County v. City of Chicago*, 311 Ill. 234, our Supreme Court held that the County must observe the fire prevention regulations of the City relative to the construction of a jail by the County. The decision in this case was, in our opinion, sufficiently broad to cover all quasi-public municipal corporations, such as a park district the territorial confines of which lie within the limits of a City. The only exception to this statement might arise in case the statute creating such a quasi-public municipal corporation in express terms gave said corporation police power over the regulation of buildings within the City limits. This, however, the Small Park Act of 1895 does not do.

You do not state whether the City ordinances which are being violated by the Fernwood Park Board are ordinances relating to safety in construction or to safety from fire hazards. If the ordinances violated by the Fernwood Park Board in anywise relate to safety from fire hazards, or safety

from the point of view of construction, we hold that the Fernwood Park Board must comply with those ordinances, and that you are justified in insisting upon such a compliance.

Very respectfully,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Invalidity of Council Order Directing Fire Commissioner to Issue Permit in Violation of Ordinance.

January 14, 1925.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

You have called to the attention of this office the following council order which appears on page 4407, upper right-hand column, of the Council Proceedings of January 2, 1925:

“Ordered, That the Chief of Fire Prevention and Public Safety be and he is hereby directed to issue a permit to the Sinclair Refining Company to install gasoline tanks in connection with a filling station to be located on the east 48 feet of the property at the Southeast corner of South Ashland boulevard and West Harrison street, provided the necessary majority of frontage consents are obtained as required by ordinance.”

You have also advised this office that the location for the filling station in question is within 200 feet of a church and violates the City ordinance relative to filling stations.

The above quoted council order is invalid for two reasons. It is invalid because it purports to modify the general ordinance of the city relative to filling stations, and the law

is well settled that an ordinance cannot be repealed, amended or in anywise modified by a council order. It is invalid, in the second place, because it attempts to make a discrimination in favor of one person. It is therefore unconstitutional, and even if an ordinance were passed purporting to authorize the Sinclair Refining Company to install this filling station in violation of the general ordinance, the special ordinance would be invalid.

We therefore advise you that you ignore the above quoted council order and refuse to issue any permit for a filling station at the locality in question.

Very respectfully yours,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

License for Operating Oxygen and Hydrogen Plant Used in Connection With Rendering Business.

Chicago, January 16, 1925.

JAMES E. TODD, Esq., Secretary, Revenue Commission.

Dear Sir:

Some time ago you sent us a letter in regard to license for operating a plant for the generation of oxygen or hydrogen and the compression of the gases. The question you asked was whether the provisions of Section 1557 of The Chicago Municipal Code of 1922 applied to Swift & Company. Attached to your letter was one from the attorney for Swift & Company, who contended that the plant in question was operated in connection with the general slaughtering and rendering establishment, was incidental to the business, and that the

general license for the business covered this plant as well as all other operations therein.

We found it necessary to write to the attorneys for Swift & Company for further information, and received a letter in which the use of the plant was further explained. After this the writer had numerous talks with members of the license department, and this gave rise to the impression that your inquiry had been answered, but it seems that such was not the case.

The question you ask is one that is perplexing on account of the unusual nature of the operation involved. Under ordinary circumstances such an incidental process as this would have to be construed as a part of the business. The slaughtering and rendering business, by the terms of the ordinance (Sec. 2076) includes practically everything in the way of preparation of carcasses of animals and changing the substances obtained therefrom into food, including "the changing the form thereof in any manner by the use of heat, steam, fire or chemicals, or otherwise." This might be held to include the use of the hydrogen process for the hardening of fats and oils into marketable shortening material.

The difficulty lies in the fact that the City Council in putting the provision for the inspection and licensing of hydrogen and oxygen plants into the chapter of the code relating to fire prevention, and giving jurisdiction to the Chief of the Bureau of Fire Prevention and Public Safety to enforce the provisions of same, plainly intended that there should be rigid inspection and supervision, and that the license was a part of this regulatory measure. Every regulatory provision relating to the business outside of this is under the jurisdiction of the Commissioner of Health. (See Sections 2076 to 2092, inclusive.)

Under these circumstances we feel that it would be destroying the effectiveness of an ordinance designed to protect life and limb to hold that the provisions embodied in Section 1557 need not be observed by a concern that takes out a slaughtering and rendering establishment license. We under-

stand the question of revenue involved is very slight, being practically limited to this one institution. Therefore, if the revenue feature were stricken out by means of a proviso that excludes the license fee in such cases, that would be the consistent thing to do. Unless and until that is done, however, in our opinion the entire section applies to the plant of Swift & Company.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Status of Blind Alley Back of Proposed Addition to Roanoke Building.

January 16, 1925.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

You forwarded to us a letter written to you by Messrs. Holabird and Roche, architects, with relation to what they call a "private court," back of certain premises on Madison street on which it is proposed to erect an addition to the Roanoke building. The question whether this is to be construed as a public alley or a private alley has to do with the approval of the plans presented to you, and you desire to be advised in regard to this point. We are told that it is not the intention to obstruct the alley or render its use more difficult or in any way different from its present use.

The court or alley extends west from a north-and-south public alley that runs from Madison street to the Arcade

south of the Y. M. C. A. building. A copy of the agreement under which it was established in its present form was submitted to us, and we have examined the portion of the abstract which affects the situation.

The agreement before us represents that there was a former agreement between the owners of all the lots involved, entered into about the year 1867, of which we have no record whatever except what is stated in the new agreement. It recites that by the former agreement the owners contracted for the keeping open perpetually of a strip of land for a court or alley "for the mutual accommodation of Lots 3, 4, 5 and 6"—all the property affected in any way by the present court as well as by the court established in 1867. The agreement then goes on to say that the owners of a part of the property who own Lots 3 and 4 desire to change the court by taking off 15 feet of the west end and adding a strip 8 feet wide along the south side of the remainder, such changes affecting only Lots 3 and 4. This makes a court approximately 85 feet long and 21 feet in width. The agreement has the following with respect to the use and maintenance of the court:

"And further in consideration of the premises aforesaid, it is mutually agreed by and between all the parties of the first and second parts hereto, that the said court twenty-one (21) feet in width shall not be diminished in width nor shall it be arched or covered or built over in any of its parts (except by the mutual written and recorded consent and agreement of all the parties to the present agreement or their legal representatives), but it shall be and remain in all its parts perpetually free and open East from the East line of said Lot four (4) to the West line of the alley which runs North and South in said Block:

And further that the expense of making, covering and keeping in repair the covering of the subterranean part of said court as to the eight (8) feet enlargement hereinbefore specified shall be borne by the said Association (it having the entire use and control thereof and the similar expense as to the remaining thirteen (13) feet of width shall be borne by the parties of the second

part hereto respectively opposite their several lots (they having the entire use and control thereof). Said court or private alley is to be used mutually and in common by all said parties for light and air as also for the ingress and egress of persons and for bringing in and taking out furniture, goods, wares, merchandise and other articles for said parties or the tenants of the premises."

We have made diligent search of the City's records, and have made inquiry in the Real Estate Division of the Comptroller's Office, the Bureau of Maps, the Bureau of Streets, the Department of Health, and elsewhere to ascertain whether the City at any time exercised or attempted to exercise jurisdiction over the court in question as a public alley. We could find no record which indicated that the City has ever treated it as public ground.

While the search that we have made does not enable us to assert any claim to the property affirmatively, nevertheless we are not disposed to foreclose the City by any finality of decision in this opinion, from making such claim if occasion arises and better grounds for same are discovered. The necessity for preserving every foot of public ground in the congested central district, the long use of the court as a sort of an annex to the adjoining public alley, the absence of a record of the first agreement, and various other things that could be mentioned make us reluctant about saying that the place is a private court, and we do not want to be understood as yielding any of the City's rights which we may be able to assert at some future time. But for the purposes for which the matter has arisen we feel bound to advise you that you will have to construe it as a private alley.

The plans you have before you are drawn on the theory that Paragraph (b) of Section 20 of the Zoning Ordinance does not apply in the case of the proposed new building which will adjoin this court. In our opinion you will have to concede this point, whatever effect such concession may have on future controversies that may arise concerning this ground. We are endeavoring, by explaining our position, to avoid

having it regarded as a precedent that will bind the City in the future in case there is necessity for asserting a claim to it.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Licensing of Hotels by Licensing Incidental Businesses.

Chicago, January 16, 1925.

HON. JOSEPH O. KOSTNER, Chairman, Commission on Revenue.

Dear Sir:

Among the old license matters which the writer is endeavoring to clean up, before undertaking the work of restoring license provisions that have been taken away from the City, is one which has to do with a sort of general hotel license ordinance.

It was decided a long time ago that we have no power to license hotels. (See *City of Chicago v. M. & M. Hotel Co.*, 243 Ill. 264.) Every hotel, however, operates in connection with its hotel business more or less businesses that may properly be licensed. These licenses have not been collected because the Hotel Keepers Association made some kind of an agreement with the License Department to the effect that if a general hotel license was provided for authorizing the operation of all these businesses by a hotel the back license fees would be paid.

Negotiations went so far that an ordinance was presented to the writer that was prepared by the attorneys for the Hotel Keepers Association. We could not give our approval to this

ordinance, because it was purely and simply an ordinance licensing hotels, as such, which we could not enforce. Moreover, it was presented to us just at the time when we had sent a number of repealing ordinances to the City Council designed to wipe out licensing ordinances that we could not sustain in the courts.

Thereupon a letter was sent to you by the Superintendent of the License Department calling attention to the loss of revenue that would be entailed if there was no hotel licensing ordinance. This letter was apparently drawn on the theory that no license fees could be collected from hotels for operating activities requiring licenses unless a general hotel licensing ordinance was enacted. You sent this letter to us, with the request that we prepare such an ordinance.

If it is desired to have an ordinance which will enable hotel keepers to follow the various occupations which are a necessary adjunct to their business, it would be possible to frame a sort of combination ordinance that could be called by some name indicating the character of same and authorizing the operation of the said occupations. We do not believe, however, that such an ordinance would stand the test of validity if the license fee were reduced below the total of the fees required for the businesses authorized.

We have on the books a number of licensed occupations which include, as incidental to the business, some other licensed occupation. In such cases we have framed the ordinances so that there would be no license required for the incidental occupation, but in every instance the license fee of the main business was either as much or more than the license fee of the incidental business. At least this was the intention—since otherwise there would be a discrimination that could not be justified.

With respect to hotels, if we had the right to put a license fee on them that was adequate and which was sufficient to cover at least a number of these incidental occupations, such a plan as is proposed would be feasible. But in the absence of the power to license hotels, unless we can find another

licensable business that hotel keepers generally pursue on which an adequate license fee could be imposed, we have no right to bunch several of these licenses together and sell them at a bargain price.

There appears no good reason, on the other hand, for failing to collect the license fees which the City has the right to exact. A hotel keeper is no more immune from license fees than anyone else, and all valid license fees should be collected from him.

A great deal of this difficulty—in fact, almost the greater part of our license difficulties—would be avoided if we secured authority from the General Assembly to license hotels and restaurants.

We will, therefore, make an attempt to obtain such power at the present session of the Legislature. Pending the disposition of the matter in this way we are ready to take such steps as you may desire to meet the present situation.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Division of Cost for Resurfacing of Streets.

Chicago, January 16, 1925.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

The writer has before him a file relating to a plan for resurfacing street pavements which remains undisposed of because the request we made of Alderman Kostner, who originated the proposition, for a concrete case on which to work

has not been answered. For the purpose of closing up the matter we bring it to your attention.

The question of the right of the City to distribute the cost of resurfacing streets so that one-half of the expense should be borne by the abutting property owners and the other half by the City was referred to this department by you, along with the draft of a form of ordinance which Alderman Kostner submitted and you requested an opinion from us. The subject-matter had received consideration in this department on several occasions, as will be seen from what follows.

An opinion was written on the subject on October 20, 1916. This appears in the printed volume of Opinions of the Corporation Counsel and Assistants from July 1, 1916, to December 31, 1919, at page 119. In this opinion it was decided that such a plan was not feasible, principally because it took the determination of the amount of the assessment to be levied against either the City or the property owner away from the court and placed it at an arbitrary figure. It was not constitutional to impose an assessment in this way on the abutting owners.

After this, in 1923, the General Assembly undertook to get around the objections urged in the above opinion. A bill was introduced which was so modified by the writer that when it became a law the principal obstacle was done away with. (See Cahill's Rev. St. 1923, p. 473.) Whether it will finally be found valid and practicable can only be determined by a test case.

The act referred to says that the City may, by ordinance, provide for the resurfacing of streets when the pavement becomes disintegrated, by the payment of the whole or any part of the cost by special taxation of the lots fronting thereon, or by apportioning the cost so that part of it shall be paid by special assessment upon property benefited. It further provides that the corporate authorities of any city (the City Council) may initiate such proceedings, but that after the ordinance providing for the work has been passed

all proceedings shall be in accordance with the Local Improvement Act.

You will readily see from the above that a painstaking effort has been made to bring the act within constitutional lines. Whether the effort will hold good remains to be seen. It will have to be tested through some form of litigation. On this theory we wrote to Alderman Kostner, under date of June 6, 1924, that if he would select a street in need of resurfacing and would confer with us in regard to it, we would then endeavor to draft an ordinance under which the test could be made.

This is where the matter stands now. We presume it will not be revived at present. If it is your intention again to bring the matter up we will do what we can to render the act effective. In the meanwhile your file and our own can be closed so that it may no longer be regarded as a pending proposition.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**City Not Under Duty to Repair and Replace Sub-Side-
walk Floors Torn Up in Connection With the
South Water Street Improvement.**

January 16, 1925.

MR. T. A. EVANS, Engineer of Design, Board of Local Improvements.

Dear Sir:

In your letter of January 13th addressed to Mr. Thomas A. Sheehan, Attorney, Board of Local Improvements, you state:

“In the construction of the sidewalks in Market street, which is part of the South Water Street Improvement, it has been necessary in the construction of the new curb retaining walls to tear up the concrete floor underneath the existing sidewalks. These floors are used by the adjoining property owners for various purposes and as a rule are on a level with the basements of the existing buildings.

A request has been made by H. Channon Company that the City replace the floor adjacent to their building on the southeast corner of Randolph and Market streets, their contention being that the City is obligated to put things back in the same condition that they were before construction commenced.”

Your request for an opinion as to the obligation on the part of the City to replace said floor and otherwise incur expense in repairing the sub-sidewalk space for the property owner's use, such space being entirely outside of the building, has been referred to the undersigned for consideration and reply.

We are advised that the foregoing work is made necessary by reason of the construction of said public improvement and that such work is being done strictly in accordance with the provisions of the ordinance providing therefor, and the engineering plans covering the work in question; that no claim is or has been made by the H. Channon Company that said work is being done in a negligent or unskillful manner, or that any damage has resulted that is not reasonably necessary in the work of construction of said improvement.

The particular premises involved are known as 149 North Market street, the legal description thereof being as follows:

Lot One (1) in Starkweather's Subdivision of The West three-quarters ($W\frac{3}{4}$) of Lot Four (4) in Block Forty-two (42), being a part of the Original Town of Chicago, in the Southeast one-quarter ($SE\frac{1}{4}$) of Section Nine (9), Township Thirty-nine (39) North, Range Fourteen (14).

The fee of the streets in the Original Town of Chicago, as platted by the canal commissioners, is in the

City of Chicago and not in the owners of the abutting property.

Tacoma Safety Deposit Co. v. City of Chicago, 247 Ill. 192, 196.

Where the fee in the street is in the City the lot owner has no interest in the street except in common with the public,—“the right of passage over it.” In such case he has “no title to be assailed, no possession to be invaded.”

Canal Trustees v. Haven, 11 Ill. 554.

Hunter v. Middleton, 13 Ill. 50.

Zinc Co. v. LaSalle, 117 Ill. 411.

Coal Co. v. LaSalle, 136 Ill. 119.

In the case of *People v. Field & Co.*, 266 Ill. 609, the court, at page 619, said: “This court has stated that cities, in controlling and improving streets, are charged with the unquestioned duty of preparing them for public use at such time and in such manner as the public necessities may require; that, holding the streets in trust for the public, the City authorities can not convey or divert them to other uses by granting to corporations or individuals rights or easements in the streets which interfere with the duty of preparing them for public use or to meet the public necessities; that in administering the trust the City cannot voluntarily place it beyond its power to discharge its duties therein.” (Citing cases.)

And continuing, at page 621, the court said: “A property owner cannot claim the absolute right to take up his sidewalk and extend his coal cellar under it, but this right may be granted by the public authorities in such a manner as not to interfere with the rights of others or of the public. (*Nelson v. Godfrey*, 12 Ill. 20.) A city, under special legislative authority as well as its general power, may grant permits for the building of vaults under the streets and sidewalks and require such compensation for the privilege as it may deem reasonable and just, the general doctrine being, that municipalities, under the power of exclusive control of streets, may allow any use of them consistent with the public objects for

which they may be held. (*Gregsten v. City of Chicago*, 145 Ill. 451.) This, however, can only be done when the paramount right of the public to the full, free and safe use of the street in all of its parts is not thereby infringed upon. (*West Chicago Masonic Assn. v. Cohn*, 192 Ill. 210.)

This court has quite recently had before it for consideration the respective rights of abutting property owners, the City authorities and the public with reference to the use of the space under the surfaces of the streets, both when the fee was owned by the City and when it was owned by the abutting property owner. In these cases it was decided that the rights of the abutting owners as to the space in the street beneath the surface when owning the fee in the street, were greater than when the fee was in the City; that when the abutting lot owner was the owner of the fee he had the right to make any reasonable use of the street which did not interfere with the free enjoyment of the public easement therein, whereas when the City owned the fee the abutting lot owner had no right in it except as granted by the municipality; that in any event, whether the fee title was in the City or the abutting property owner, the street under the surface of the ground could only be used in such a manner as would safeguard the paramount right of the public to the full and unobstructed use of the street for the purpose for which it was dedicated; that the City would not be estopped by any action of its own from requiring the space occupied beneath the street to be surrendered to the City whenever it became necessary for the uses of the public." (Citing cases.)

In *McQuillin*, Mun. Corp., Sec. 1968, it is said: "Apart from imposition by written law, negligence, want of skill or active wrongdoing, no municipal liability arises for consequential damages resulting from the construction of public improvements, including the construction of streets and sewers.

True, liability arises where there has been an actual taking or damaging that is not consequent upon the exercise of reasonable care in the doing of the work."

A municipal corporation cannot be held liable for consequential injuries that result from the construction of public works in the absence of negligence or want of due care and skill, and this includes the construction, maintenance and operation of sewers and streets. *Indianapolis v. Williams*, 58 Ind. App. 447; 108 N. E. 387, 389."

Where there is no negligence, no liability arises. This doctrine is almost universally accepted by the state courts of this country. The remedy therefore, for a consequential injury resulting from the state's action through its agents, if there be any, must be that, and that only, which the legislature shall give. It does not exist at common law. But when negligence exists in doing municipal work the rule is otherwise, and the corporation becomes liable for damages. *Hoyle v. Hickory*, 167 N. C. 619, 621; 83 S. E. 738. (Citing Sec. 1968, McQuillin, Mun. Corp.)

In the case of *Hieber v. Spokane*, 73 Wash. 122, 131 Pac. 478, it is said: "It is the duty of a city to maintain streets and bridges, and such inconveniences as necessarily follow the performance of that duty are a burden the property owners must bear. * * * It is only where there has been an actual taking or a damaging that is not consequent upon the exercise of reasonable care in the performance of the work, that the city will be held liable. Of course, the city would be liable for any damage resulting from a physical projection of the instrumentalities used to carry on the work over the adjoining property. If it should appear that the owner will suffer such damage he may restrain the prosecution of the work or he may permit it to go on, claiming his damages in an action at law."

By reason of the foregoing, we are of the opinion that there is no obligation on the part of the City to replace the floors and make the repairs in question in the absence of a showing of negligence on the part of the City in performing the necessary work in the construction of the improvement; that the abutting property owners have only a right to share with the public at large the enjoyment of the use

of the public easement in the street. This easement contemplates not only the use of the surface of the street but also the sub-sidewalk space.

Any change in grade made necessary by the construction of the improvement in question will necessitate the abutting owner conforming his use and occupation of the public right of way outside his building line to the new physical conditions made necessary by the improvement.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Speed of Street Cars.

January 16, 1925.

ALDERMAN FRANK J. TOMCZAK,
City Hall, Chicago.

Dear Sir:

Replying to your letter of the 15th instant, beg to say that there is no general statute or ordinance regulating the speed of street cars.

Section 3844 of The Chicago Municipal Code of 1922 prohibits the running of a street car within 400 feet of any school house in the City at a greater rate of speed than 5 miles an hour between the hours of 8 o'clock a. m. and 5 o'clock p. m. on any day during which school is in session for such school house.

Section 3845 of The Chicago Municipal Code of 1922 prohibits the running of a street car within 400 feet of any public playground in the City at a greater rate of speed than 5 miles

an hour during the hours of 8 o'clock a. m. and 5 o'clock p. m. on any day on which said playground is open and in operation.

Section 3846 of The Chicago Municipal Code of 1922 prohibits the running of a street car within 400 feet of any church in the City at a greater rate of speed than 5 miles an hour during the time or times that persons are customarily entering or leaving churches on Sundays or holidays or any other day set apart by such church for religious worship.

Of course, aside from any statutory or ordinance regulations, under the common law, street cars must at all times and under all circumstances be operated with reasonable care and caution for the safety of persons and property.

Very truly yours,

FRANCIS X. BUSCH,
Corporation Counsel.

Appropriation From Bond Fund Without Reference to Time of Passage of Appropriation Bill.

January 20, 1925.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

In your letter of recent date you call attention to an appropriation asked for the public library, for the purchase of sites and the erection of buildings, etc., "contingent upon approval of bond issue for purposes as specified." You ask whether this item should be included in the appropriations in the Annual Appropriation Bill now about to be passed, or whether such appropriation could be made later in case the bond issue is approved by the voters.

This brings up a question that has often been asked of us, and that we have as frequently answered. That is the

question whether appropriations from bond funds may be made at any time of the year without reference to the time of passage of the Annual Appropriation Bill or to the time within which appropriations from miscellaneous receipts may be made.

On this question we have always taken the position that while there is authority for holding that the City Council may pass an ordinance authorizing expenditures from bond funds at any time of the year, nevertheless we would advise against exercising this authority, for the reason that there is an element of doubt that still exists in spite of decisions leaning towards our view. Aside from this, it has been indicated to the writer frequently by the chairman and members of your committee that there are objections to setting the precedent for such intermediate appropriations from the standpoint of policy.

Supporting our view of the law, the Supreme Court, in *People ex rel. Stuckart v. Day*, 277 Ill. 543, held that an appropriation was made when the tax levy provided by the bond ordinance was adopted, and we call attention to the following, from *People ex rel. Stuckart v. Sandberg*, 282 Ill. 245, at page 253:

“In *People v. Day*, *supra*, we held that the provision by a municipal corporation incurring a debt and issuing bonds therefor that an annual tax shall be levied sufficient to produce a specified sum, amounts to an appropriation of that sum for each year during the existence of the debt, and that the municipality may levy and collect the tax though not included in a general appropriation bill.”

This principle was again upheld in *People v. Wabash Ry. Co.*, 281 Ill. 382, and also in *Schwartz v. City of Chicago*, 232 Ill. App. 184, where the court said, at page 196:

“In the *Day* case it was objected that certain taxes sought to be levied were invalid because they were not included in the annual appropriation ordinance or bill. After the passage of the annual appropriation ordinance

but before the tax levy ordinance was passed, certain other ordinances were passed authorizing the issuance of bonds under the constitution and statute before mentioned, and it was held that these might legally be included in the tax levy ordinance, and that the raising of the money by means of the sale of the bonds was an appropriation of the funds to the particular object mentioned in such ordinance.”

From these authorities we gather that the passage of a bond ordinance and its submission and approval by the voters in itself constitutes an appropriation for the purpose fixed by the ordinance.

There was no question concerning funds derived from bond issues before the court when the case of *People v. Sergel*, 269 Ill. 619, was decided. It is sometimes said that the following language negatives the view we take as expressed above:

“The statute, by language plain and unambiguous, limits the expenditure of corporate funds to the amounts appropriated during the first quarter of the fiscal year for the respective corporate purposes mentioned in the appropriation ordinance and prohibits any other appropriation being made at any other time within such fiscal year.”

People ex rel. Chadwick v. Sergel, 269 Ill. 619-624.

We do not believe that the language just quoted overcomes the authorities first cited, even though it may raise a doubt. Hence, we have advised the City Council that if it desires to retain control over the fund derived from a bond issue it is necessary to make provision for it in the ordinance authorizing the bonds. This has been done on all such ordinances recently passed.

We have gone over this matter fully in order that you may understand that if the necessity arises for making expenditures from bond funds that have not been provided for in the Annual Appropriation Bill it can be done. We see no objection, however, to making the appropriation as proposed, contingent on the approval of a bond issue. This has fre-

quently been done, and there is no legal obstacle whatever to such a procedure.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Motion Picture Containing Only Reading Matter
Comes Within Purview of Ordinance.**

January 21, 1925.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

You have forwarded to me a communication from the Celebrated Players Film Corporation, in which it is stated that the corporation intends to show a reel at the McVicker Theater without making application for a permit. It is further stated that this reel shows only reading matter and not motion pictures and that, for that reason, the corporation has been advised by its attorneys that the ordinance does not require a permit to be obtained.

Section 2785 of The Chicago Municipal Code of 1922 provides as follows:

“PERMIT REQUIRED TO EXHIBIT MOVING PICTURES.) It shall be unlawful for any person, firm or corporation to show or exhibit in a public place, or in a place where the public is admitted, anywhere in the City of Chicago any picture or series of pictures of the classes or kinds commonly shown in mutoscopes, kinetoscopes, cinematographs, and such pictures or series of pictures as are commonly shown or exhibited in so-called penny arcades,

and in all other automatic or moving picture devices, whether an admission fee is charged or not, without first having secured a permit therefor from the superintendent of police.

It shall be unlawful for any person, firm or corporation to lease or transfer, or otherwise put into circulation, any motion picture plates, films, rolls or other like articles or apparatus from which a series of pictures for public exhibition can be produced, to any exhibitor of motion pictures, for the purpose of exhibition within the city, without first having secured a permit therefor from the superintendent of police."

It will be observed that the two paragraphs of the above section are not exactly similar in their description of the kind of pictures for which a permit must be obtained, in that the first paragraph refers to pictures which are commonly shown in cinematographs, etc., and the second paragraph makes it unlawful to put into circulation any motion picture films from which a series of pictures for public exhibition can be produced, without first having secured a permit. Among the definitions given for the word "picture" in the Century Dictionary, is the following "a vivid and graphic representation or description in words."

We are inclined to hold that the mere fact that a motion picture film portrays written matter, instead of depictions of various scenes, does not bring the subject-matter outside of the purview of the ordinance. It is our suggestion that you instruct the City Prosecutor to make a test case in order to obtain a ruling from the court upon this question.

We also wish to call to your attention, however, that if the motion picture in question should contain any matter which is immoral or obscene, or which is in any way indecent, the exhibitors, and all persons concerned in the exhibition of the picture, may be prosecuted under Section 455 of the Criminal Code (Cahill's Illinois Revised Statutes of 1923, p. 1227), which makes it unlawful to exhibit any obscene or immoral pictures *or publications* and provides a fine for the same of not less than one hundred dollars

(\$100) nor more than one thousand dollars (\$1,000) for each offense.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved: .

FRANCIS X. BUSCH,
Corporation Counsel.

Registering Bonds and Interest Coupons of Police Pension Fund.

January 26, 1925.

THE RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY AND
BENEFIT FUND.

Gentlemen:

Paragraph "E" of Section 6 of the Policemen's Annuity and Benefit Fund Act requires that any bonds purchased by The Retirement Board shall be registered in the name of the Annuity and Benefit Fund.

While nothing is said as to interest on these bonds, it is a presumption of law that the bonds being an investment of trust funds, the registration requirement applies equally as well to the interest on such investment if the interest coupons are capable of registration.

I am of the opinion that the registered bonds belonging to the Annuity and Benefit Fund should be registered as to interest as well as to principal when the interest coupons are capable of registration similar to the bonds.

Respectfully submitted,

GEO. F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Erection of Electric Sign Over Depot of Chicago and Northwestern R. R. Station.

January 29, 1925.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

You have forwarded to this office a letter received from the Chicago and Northwestern Railway Company requesting permission to erect two electric roof signs on that part of their building which crosses Washington boulevard and is included between the north street line of Washington boulevard and the south street line of Washington boulevard, the building extending from Clinton street to Canal street. One of these signs is to be erected on the Clinton street side of the building so that it will face west down Washington boulevard, and the other is to be erected at Canal street in such a way as to face east down Washington boulevard. The sign itself is a large illuminated sign bearing the words "Chicago and Northwestern Railway" and does not contain any other advertising matter.

The station referred to was erected by permission of the City under and by virtue of the Passenger Terminal Ordinance passed December 17, 1906 (C. P. 2405). According to Section 1, Paragraph 1, of said ordinance, permission and authority is granted "to construct, maintain and operate a railway passenger station * * * including all tracks, buildings and *structures of every kind* essential or convenient for such station as herein authorized and provided." Under the above quoted provisions of the ordinance, we believe that the power to erect the buildings and structures necessary and convenient to the use of a building as a station, includes the power to erect this electric sign. We do not believe that the railroad company would have the power to erect a sign containing general advertising matter, or which did not directly

bear upon the use of the building as a railroad station. However, the sign in question, is not objectionable from that point of view. We are therefore of the opinion, that this sign may be erected under the provisions of the Passenger Terminal Ordinance, above referred to, notwithstanding the fact that the sign will be placed over a public street.

Of course, the sign must comply with the general requirements relative to such signs contained within Section 919 of The Chicago Municipal Code of 1922. Before issuing the permit to erect this sign you should ascertain that these requirements are complied with.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Pension of John C. McDonnell.

February 2, 1925.

TO THE TRUSTEES OF THE FIREMEN'S PENSION FUND.

Gentlemen:

In connection with the application for pension of John C. McDonnell, First Assistant Fire Marshal, referred to me for an opinion as to the amount of pension to which he is entitled, I submit the following:

The statement of Nicholas R. Finn, President, Civil Service Commission of the City of Chicago, dated January 15, 1925, forwarded to me by you, shows that John C. McDonnell was a hold-over Captain in 1895, when the Civil

Service Act was enacted; was promoted January 4, 1904, to Chief of Battalion; was promoted April 1, 1911, from Assistant Fire Marshal's list as 4th Assistant Fire Marshal, with change of title April 28, 1914, to 3d Assistant Fire Marshal and Chief of Fire Prevention and Public Safety, with change of title on June 3, 1918, to 2d Assistant Fire Marshal and Chief of Fire Prevention Bureau; that he was suspended September 22, 1923; discharged October 3, 1923; ordered reinstated June 12, 1923, as 2d Assistant Fire Marshal and Chief of the Bureau of Fire Prevention; that on July 3, 1923, there was a change in title to 1st Assistant Fire Marshal, and that he resigned December 1, 1924.

John C. McDonnell, being now 61 years of age, and having served more than twenty years in the Fire Department, the last five years of which twenty-year period of service was continuous, he became entitled to a pension, in accordance with Section 8 of the Firemen's Pension Act, of a monthly pension equal to one-half the amount of the monthly salary attached to the rank he may have held in the fire service at the date of his retirement, but not to exceed the sum of \$3,000 per annum.

I am of the opinion that John C. McDonnell is entitled to be paid a monthly pension equal to one-half the amount of the monthly salary attached to the rank of 1st Assistant Fire Marshal as such salary was on December 1, 1924, but not to exceed the sum of \$3,000 per annum.

I am returning herewith the papers sent me in this matter.

Yours respectfully,

GEO. F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Parking of Automobiles in Front of Private Premises by Strangers.

February 9, 1925.

HON. ROSS A. WOODHULL, Alderman, 7th Ward.

Dear Sir:

We have your communication of the 5th inst., in which you request to be advised as to what right a property owner has relative to the parking of automobiles in front of his premises.

This unfortunate situation obtains in many districts in Chicago where large movie houses attract patrons who live a sufficient distance away to drive their automobiles and of necessity park their cars as close to the theatres as they can.

But the streets belong to the general public and their use everyone enjoys upon terms of equality with others. In the absence of any ordinance to the contrary, the stranger has equal rights to park his car in front of any property as the owner of that property.

Yours very truly,

JAY A. SCHILLER,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Application for Pension Under Municipal Employees' Act.

February 13, 1925.

THE RETIREMENT BOARD OF THE MUNICIPAL EMPLOYEES ANNU-
ITY AND BENEFIT FUND.

Gentlemen:

Replying to your inquiry as to the right of your Retirement Board to date back the payments of age and service

annuity benefits prior to the date of receipt of the application to become an annuitant, in the case of Isaac D. Rawlings, the following is respectfully submitted:

It appears from your letter that Dr. Isaac D. Rawlings on list as Principal Assistant, Bureau Chief, Health Department, became 55 years of age on April 29, 1924, and signed an application to become an annuitant before a notary public on June 7, 1924, but failed to file the papers until January 14, 1925; that Dr. Rawlings has asked if the benefits could be dated back to May 1, 1924, at which time he was eligible under the question of age.

The records show that Dr. Rawlings had served more than 10 years before reaching the age of 55 years and that he was out of the active service at the time he reached such age.

Section 27, Paragraph "H" of the Municipal Employees Annuity and Benefit Fund Act provides as follows:

"When any present employe who shall resign or be discharged from the service after such present employes shall have served for a period of ten (10) or more years, before he shall attain an age of fifty-five (55) years shall attain such age of fifty-five (55) years while out of the service, the amount of age and service annuity and the amount of prior service annuity to which he shall have a right from and after the time he shall have attained such age of fifty-five (55) years and shall have applied for annuity * * * shall be fixed," etc.

It is apparent that under the present municipal employees pension act, a present employe who has served ten (10) or more years becomes entitled to retire on pension when he has attained the age of fifty-five (55) years and *has applied for annuity*. In other words, the employe does not become entitled to an annuity until he has *applied* for the same. Application for annuity is made when the application reaches the pension board, and not on the date that it was signed or mailed, as it does not become an application until the intention of the employe is made known to the board, through delivery to the board of formal notice or request for annuity.

I am of the opinion that this annuity benefit or payment cannot be dated back of the date on which it was received.

Respectfully submitted,

GEO. F. MULLIGAN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Demand of Lieutenants in the Fire Department to Participate With Captains in the Promotional Examinations for Chiefs of Battalion.

February 15, 1925.

HON. NICHOLAS R. FINN, HON. EDWARD J. EVANS, and HON. JOHN R. PELKA, as the Civil Service Commission of the City of Chicago.

Gentlemen:

On the 13th instant, you submitted to the Law Department "request for an opinion on the petition and demand of certain lieutenants of the Fire Department to be allowed to participate in the examination for chief of battalion."

The gist of the petition is that these lieutenants are in the same line of service in exclusive command of fire companies as the captains, and that they are not subordinate to such captains. That, except for a slightly larger salary provided for the captains than for the lieutenants there is no distinction existing between them. The captains and lieutenants alternate in command of companies in the "double platoon system."

Counsel for the petitioners refer to the cases of *People v. Errant*, 229 Ill. 56, and *People ex rel. Loftis v. Frazier*, the abstract of which appears in 214 Ill. App. 664, and the official opinion of which is Number 24788 in the Appellate Court for the First District. We do not consider that these

cases conclusively determine as matter of law the right of the lieutenants contended for here. We believe this case presents rather a question of the exercise of sound discretion on the part of the Commission in classifying and rating these captains and lieutenants in reference to the higher position of battalion chief. In making the decision, however, we believe the cases cited will be helpful, especially the latter case, which was a mandamus successfully prosecuted against the Commission and sustained on appeal by Justice Dever. The case is peculiarly similar in that several detectives of the next lower grade, although of different names, salaries and distinctive services were all alike held to be entitled to participate in the promotional examinations. We advise the Commission to procure a copy of this decision from the Clerk of the Appellate Court and consider it as part of our opinion herein.

We are inclined to regard the petition of the lieutenants as a strong one, because their services are identical with those of the captains. Furthermore, the City Council in the ordinance of May 21, 1924, for the reorganization of the Fire Department, no longer recognizes the positions of captains and lieutenants as following the positions of chief of battalions, but defines the positions after that of battalion chief as "subordinate commanding officers." (Compare Sec. 1158 of the new ordinance with 1155, Chicago Mun. Code of 1922.) The Council, it seems to us, have abolished whatever distinction in rank was formerly recognized to exist between captains and lieutenants in command of fire companies."

Very respectfully submitted,

FRANCIS J. VURPILLAT,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

(Editor's Note: See subsequent opinion on the same subject, *post*, under date of March 14, 1925.)

Status of Police Operators.

February 16, 1925.

HON. NICHOLAS R. FINN, President, Civil Service Commission.

Dear Sir:

Replying to your letter of the 11th instant, concerning the status of police operators, we submit the following:

The Appropriation Bill for the year 1925 makes provision for 128 patrolmen assigned as operators at the same salary as that fixed for patrolmen on regular duty. The positions in question have heretofore been held by police operators.

Pursuant to the new appropriation, you have received a communication from the Police Department regarding the current payroll, with the request that the 128 men heretofore holding the grade of police operator should have their titles changed to patrolman. You ask whether you have the right to comply with such request.

From inquiry made by us we have ascertained that it was not the intention, and it is not now the intention to separate from the service the police operators who have a regular Civil Service status. This could not be done under the ruling of the Supreme Court in *City of Chicago v. Luthardt*, 191 Ill. 516. It was there held that merely changing the name of the position without in any way changing the duties of the position would not result in abolishing the position or depriving the incumbent of his rights under the Civil Service.

Applying these same principles to the case before us, we are inclined to the opinion that the operators may be continued in their places with some distinguishing title such as "operator-patrolman or "patrolman-operator" without disturbing the status of such employees.

It is stated that the examination for operators is at least as severe as the one for patrolmen, and that by reason thereof there ought to be no distinction. We have not inquired into this phase of the question, but would be slow to say that a man who qualifies as an operator necessarily has the physical qualifications that are required of a patrolman, even though the other part of the examination may be as severe.

We recommend, therefore, that you comply with the request of the Police Department to the extent of giving some sort of designation to these operators which will serve to distinguish them from the regular patrolmen.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Jurisdiction of South Park and City Over Tunnel Under Michigan Boulevard at Van Buren Street.

February 18, 1925.

HON. DONALD McKINLEY, Alderman, 19th Ward.

Dear Sir:

You have requested this office to render you an opinion relative to the issuance of a permit for a news stand to be located in the tunnel now being constructed under Michigan boulevard at Van Buren street, and whether this permit should be issued by the City, or the South Park Commissioners, or both.

Our Supreme Court has frequently held that when a street intersects a boulevard, the City and the South Park Commissioners have concurrent jurisdiction over the inter-

section, but the jurisdiction of the City has been held to be for the use of the intersection as a public street and the jurisdiction of the Park Commissioners has been held to be for the improvement and maintenance of the intersection for use as a boulevard and pleasure driveway, and as an incident to the latter use it has been held that the Park Commissioners may exercise the police power in every particular relating to the preservation and use of the intersections for boulevard purposes, and may prescribe signals and stopping places, make regulations as to the use of street car tracks, etc. (*South Park Commissioners v. Chicago City Rwy.*, 286 Ill. 504, 508.)

We are of the opinion that the placing of a tunnel under a boulevard and the use of a tunnel including permission to construct a news stand, is a matter of which the Park Commissioners should have exclusive jurisdiction, because it relates to the use of the street as a boulevard. However, aside from this, the fact remains that there is no intersection, strictly speaking, of Michigan boulevard by Van Buren street. Van Buren street does not intersect Michigan boulevard, because it is not continued on the east side of Michigan boulevard. That being the case, it would seem to be a *sequitur* that Van Buren street ends at the west line of Michigan boulevard, and that therefore the City has no jurisdiction at all over that portion of Michigan boulevard opposite Van Buren street.

Our conclusion, therefore, is that permission for the erection of a news stand in the tunnel under Michigan boulevard at Van Buren street should be obtained from the South Park Commissioners, and that no permission is necessary to be obtained from the City whatever.

Very truly yours,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Exemption of Charitable Institution From Fees for Electrical Inspection.

February 18, 1925.

HON. JOHN T. MILLER, Commissioner of Gas and Electricity.

Dear Sir:

Answering your communication of the 10th inst. inquiring whether or not it is within your legal power to recommend the cancellation of a warrant for charges for electrical inspection made at the St. Joseph's Hospital of Chicago, a charitable institution, we desire to inform you that favorable recommendation is consistent with previous opinions of this office, and Supreme Court decisions, on closely allied charges affecting charitable, religious and educational institutions.

Our statutes clearly exempt charity hospitals from payment of taxes. Our ordinances permit of the remitting of fees for inspection of plans and issuing of permits, and for the inspection of furnaces or other fuel burning apparatus or devices, and issuing of certificates therefor under Section 2130 of The Chicago Municipal Code of 1922, and further under Section 4128 grants exemption from payment of water rates.

The City Council on many occasions has passed ordinances vacating public alleys to hospitals. It then appears to be the clear intent of our municipal legislative body to conform to the accepted theory that such concessions should be granted to institutions of this character.

While The Chicago Municipal Code of 1922 contains no specific reference for the remitting of inspection fees upon recommendation of the Commissioner of Gas and Electricity, yet the sections hereinabove referred to giving such right to the Commissioner of Health and the Commissioner of Public Works in matters similar in scope to the one referred to in your communication, as well as the Council's continual pass-

age of vacation ordinances free of compensation, leads us to the opinion that from the standpoint of consistency we should make a finding in favor of the waiver of fees in similar cases affecting your department.

This opinion deals solely with the answer to your specific question concerning your right to cancel the warrant for collection in the given case, and does not take into consideration the recent decision of our Superior Court in *Arms v. City*, 314 Ill. 316, with which you are familiar. We have, however, gone into the question of the policy to be adopted in case the power to impose fees for inspection of electrical appliances is vested in the City by the present General Assembly.

Very truly yours,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

City Employees Included by the Workmen's Compensation Act.

February 18, 1925.

HON. JOHN A. CERVENKA, City Treasurer.

Dear Sir:

Answering your inquiry whether all City employes come within the scope of the Workmen's Compensation Act, and if not, those that do, we beg leave to state the following:

“EMPLOYES TO WHOM ACT APPLIES.) Section 5. The term ‘employee’ as used in this Act shall be construed to mean:

First—Every person in the service of the State, county, city, town, township, incorporated village or

school district, body politic or municipal corporations therein, under appointment, or contract of hire, express or implied, oral or written, except any official of the State, or of any county, city, town, township, incorporated village, school district, body politic or municipal corporation therein and except any duly appointed member of the fire department in any city whose population exceeds two hundred thousand according to the last Federal or State census: *Provided*, that any such employe, his personal representative, beneficiaries or heirs, who is, are or shall be entitled to receive a pension or benefit for or on account of disability or death arising out of or in the course of his employment from a pension or benefit fund to which the State or any county, town, township, incorporated village, school district, body politic or municipal corporation therein is a contributor, in whole or in part, shall be entitled to receive only such part of such pension or benefit as is in excess of the amount of compensation recovered and received by such employe, his personal representatives, beneficiaries or heirs under this Act. *And, provided, further*, that one employed by a contractor who has contracted with the State, or a county, city, town, township, incorporated village, school district, body politic or municipal corporation, therein, through its representatives, shall not be considered as an employe of the State, county, city, town, township, incorporated village, school district, body politic or municipal corporation which made the contract."

Specifically this would include all our City's employes, excepting firemen and officials of the City, and by the decision in the case of *City of Chicago v. Industrial Commission*, 291 Ill. 23, our Supreme Court has construed the word "officials" as used in this act to include police officers.

Very truly yours,

JAY A. SCHILLER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**The Rights of the City In and To South Marshfield
Avenue from West 59th Street North to
the Right of Way of the Englewood
Connecting Railway and Alley in
the Same Neighborhood.**

February 21, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

You have called our attention to several certificates issued by the Registrar of Titles of Cook County which are now outstanding and subject to no conditions or restrictions. These certificates cover that part of South Marshfield avenue lying south of the railroad track and north of the east-and-west alley, and the north-and-south alley lying east of South Paulina street south of the railroad track and north of the east-and-west alley in the block bounded by South Ashland avenue, West 59th street, South Paulina street and the railroad track. These Certificates of Title were issued on June 15, 1899.

Smith and Hurd's Illinois Revised Statutes, 1923, Chapter 30, Paragraphs 70 and 71, on page 475, provide as follows:

“70. Decree binding—Appeals, etc.) Section 26. The order or decree so made and entered shall, except as herein otherwise provided, be forever binding and conclusive upon all persons, whether mentioned by name in the petition or included in ‘All whom it may concern.’ It shall not be an exception to such conclusiveness that the person is an infant, lunatic or is under any disability, but such person may have recourse upon the indemnity fund hereinafter provided for, for any loss he may suffer by reason of being so concluded. An appeal may be allowed to the Supreme Court if prayed at the time of entering the order or decree and upon like terms as in other cases in chancery. A writ of error may be sued out of the Supreme Court within two years after the entry of the order or decree, and not afterwards. Any person having an interest in or lien upon the land

who has not been actually served with process or notified of the filing of such application or the pendency thereof, may, at any time within two years after the entry of such order or decree, and not afterwards, appear and file his sworn answer to such application in like manner as is hereinbefore prescribed for making answer; Provided, the affidavit shall also state that such person had no notice, information or belief of the filing of such application or the pendency of the proceeding until within three months of the time of the filing of such answer. Upon the filing of such answer, and not less than ten days' notice being given to the applicant, the court shall proceed to review the case, and if the court is satisfied that the order or decree ought to be opened, an order shall be entered to that effect and the court may proceed to review the proceeding and make such order in the case as shall be according to equity in the premises. An appeal may be allowed or writ of error sued out, in such case, within a like time and in like manner as in the case of an original order or decree under this act, and not otherwise."

"71. When action may be commenced. Section 27. No person shall commence any action at law or in equity for the recovery of lands or assert any interest or right in or lien or demand upon the same, or make entry thereon adversely to the title or interest as found. ordered or decreed by the court, unless within two years after the entry of the order or decree. This section shall be construed as giving such right of action to such persons only as shall not, because of some irregularity, insufficiency, or for some other cause, be bound and concluded by such order or decree."

From an examination of Paragraph 70 we find that a decree entered in a Torrens certificate matter is forever binding and conclusive upon all persons whether mentioned by name in the petition or not. The section also shows that any person having an interest in, or lien upon, the land who has not been actually served with process or notified of the filing of such application or the pendency thereof, may at any time within two years after the entry of such order or decree, and not afterwards, appear and intervene. Although the constitutionality of this act has never been assailed in the Supreme Court, we are reserving our opinion as to its validity.

The certificates in question are nearly twenty-five years old and would necessarily prevail at this time. We are, therefore, of the opinion that the parties who are shown to be the owners under these certificates and who are in possession should not now be disturbed.

Yours truly,

FRANK T. HUENING,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

(See opinion of September 16, 1924, *supra*, on the same subject.)

Revocation of Permits to Maintain News Stands.

February 26, 1925.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

You have forwarded certain correspondence relative to the revocation of a permit to maintain two news stands located at the southwest corner of State and Quincy streets, and the northwest corner of State and Monroe streets, respectively. You also state that permission to maintain the stand on State and Monroe streets was granted by Council order, and you desire an opinion relative to whether you can revoke these permits.

Section 3735 of The Chicago Municipal Code of 1922 provides that the Commissioner of Public Works may grant a permit for the maintenance of a stand for the sale of daily newspapers within the so-called "loop district." The last sentence of Section 3739 provides that "all such stands shall

be removed at the discretion of the mayor or commissioner of public works." According to the ordinance, the mayor, or commissioner of public works, may, in his discretion, revoke any such permit at any time.

The fact that one of these permits was granted by virtue of a council order does not make any difference, because such a council order is void. The order is void first, because an ordinance cannot be altered, modified or repealed by an order, and, second, because such an order would amount to discriminatory legislation which is forbidden by the Constitution.

In conclusion, we advise you that the mayor or Commissioner of Public Works may revoke the aforementioned permits as he sees fit.

Yours very truly,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Expenditure by Board of Firemen's Pension Fund for Representation Before the State Legislature.

March 2, 1925.

BOARD OF TRUSTEES, Firemen's Pension Fund.

Gentlemen:

Complying with your verbal request for an opinion as to the right of your honorable body to expend money for necessary representation before the legislature, I submit the following:

Section 3 of the Firemen's Pension Fund Act places in the hands of your honorable body the "exclusive control and management of the firemen's pension fund."

Section 5 of the Firemen's Pension Fund Act vests certain powers in the Board of Trustees, among them the power to establish and maintain a fund in reserve, the power to order payments to be made from the fund, and the power to provide for the payment from said pension fund of all monies which may be necessary for the expenses of the Board.

If it is necessary for one or more members of your honorable body to attend a meeting or meetings of the legislature of the State of Illinois, in order to secure remedial legislation looking to the maintaining of the pension fund, or the proper and equitable management and control of said fund, the Board has the power, under Section 5 of the Act, to make provision to pay the expenses incurred by the Board, or by its members, in such work.

Necessary expenses, incurred by authority of your honorable body, in maintaining the pension fund and in and about the proper control and management of the said fund, are expenses of the Board within the meaning of the Act. All items of such necessary expenditures should be presented to the Board and approved before payment is made. The Board would, however, be warranted in anticipating and advancing railroad fare and hotel charges to any of its members designated by the Board to represent and act for the Board before the legislature, the amount so advanced to be accounted for to, and an itemized statement presented for the approval of, the Board, when the work assigned to the member or members shall have been completed, or sooner if the Board should so direct.

Respectfully submitted,

GEO. F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Notice of Special Municipal Election for Submission of Traction Questions.

March 3, 1925.

HON. AL. F. GORMAN, City Clerk.

Dear Sir:

In response to your request for draft of form of notice which the City Clerk is directed to publish and post in accordance with Section 23 of the ordinance entitled, "An Ordinance providing for a comprehensive municipal local transportation system," passed by the City Council on February 27, 1925, we beg to advise you that three separate documents should be prepared by you in connection with same.

A certified copy of the said ordinance should be forwarded to the Election Commissioners with a letter, of which we have prescribed the form. This certified copy should be prepared in the same manner as other certified copies of ordinances are prepared by you. There is to be nothing different about that certification from the ordinary certification.

When such certified copy of the ordinance is sent to the Election Commissioners it should be accompanied by a letter certifying that an ordinance was duly passed requiring questions or propositions to be submitted, further certifying that an election has been called for the purpose, and that the City Council prescribed the form of the ballot to be used. In order that you may be guided as to the manner of your certification to the Board of Election Commissioners, we have prepared the form of the letter to be sent which you may use if you see fit.

It will also be necessary for you to publish in The Chicago Evening Post, and to post at each of the polling places a copy of the notice which we have prepared for you, which we also send herewith.

By doing all three of these things you will have complied fully with the directions in the ordinance and the law requiring notice to the Board of Election Commissioners and notice to the public.

Yours truly,

LEON HORNSTEIN,
Acting Corporation Counsel.

**Ordinance Calling Special Election in 23d Ward When
Vacancy Exists.**

March 4, 1925.

HON. AL. F. GORMAN, City Clerk.

Dear Sir:

We have your letter of the 2d inst., in which you refer us to an ordinance passed by the City Council calling an election for Alderman in the 23d Ward for April 7, 1925. You ask us whether this ordinance is valid, and also what form of notice shall be given by the City Clerk.

The ordinance in question appears to be in good form, and the only doubt there is as to its validity arises from the fact that the alderman elected on February 24th for a term not yet begun has died, thereby bringing up the two legal questions, first, as to whether or not a vacancy now exists for which the election can be held, and second, whether an election on April 7th would fill the vacancy in the new term or only the vacancy that would expire as soon as an alderman for the new term was elected.

It may be said at the outset that there appears to be no real occasion for haste in calling this election, unless the lack of representation of a ward for a few weeks furnishes such an occasion. There may be some saving in expense, but it is slight as compared to the possible loss if the election is

successfully contested on the ground of invalidity. On the other hand, if the election were to be called after the time when, in the regular course of events, the late Alderman Kostner would have been sworn in for a new term, there could be no question concerning the propriety of calling same. Therefore, if any good ground exists for believing that such proposed election will be invalid, it would be the better part of wisdom to defer action until after the 7th of April. Such an election must be regarded as invalid if no vacancy now exists under the law.

Although there have been changes in respect to the manner of electing aldermen, the following two sections of Article III of the Cities and Villages Act are still in force:

“Sec. 3. Aldermen shall hold their office for the term of two years, and until their successors are elected and qualified.

“Sec. 4. If any vacancy shall occur in the office of alderman by death, resignation, removal or otherwise, such vacancy shall be filled by election.”

Section 1 (d) of Part Four of Article XII of the same act says that vacancies occurring in the office of aldermen “shall be filled in the manner prescribed by law for filling vacancies.” Without going too deeply into the details of the various sections which apply, it will suffice to say that an election to fill a vacancy will be held on a day provided by ordinance (Art. XII, Part Four, Sec. 5) and may be called if there is a failure to elect or the person elected fails to qualify (Art. IV, Sec. 14).

Where the law provides that a person shall hold office until his successor is elected and qualified, if his successor is elected but dies before he qualifies, there is no vacancy, and the incumbent retains office until there can be a legal election and qualification of a successor.

Kimberlain v. State of Indiana, 130 Ind. 120.

Com. v. Hanley, 9 Pa. 513.

State v. Benedict, 15 Minn. 198.

People ex rel. Sanders v. Stockwell, 121 N. Y. Supp.

Com. v. Sheatz, 228 Pa. 301. (See also note to this case in 50 L. R. A. (N. S.) 374, at page 378.)

So far as we are able to find, in every case where there was apparently a contrary decision there were express provisions of a statute which altered the situation. And, in strict conformity with the above decisions, it was held, in *People v. Smith*, 81 N. C. 304, that the death of an officer before the expiration of his term, but after he was elected for a succeeding term, created a vacancy only for the unexpired portion of the former term.

In like manner, where a vacancy may be filled by appointment, in case of the death of an incumbent who has been elected to succeed himself the courts very generally recognize the rule that an appointment to fill the vacancy continues only for the unexpired term. (See exhaustive note under *State v. Howell*, 50 L. R. A. (N. S.) 336, especially at p. 347.) There are many cases which hold that there need be no reappointment for the new term, but these are based on the theory that the appointee will hold over until his successor is duly elected and qualified, and they do not affect the rule.

Nor is the situation altered in this State by the case of *People ex rel. Holdom v. Sweitzer*, 280 Ill. 436, where it was held that the term of an elective office, when not fixed as to the date of its beginning, begins on the date of the election. This might have a bearing on the situation if it were not for the express provision of the statute that "no certificate of election shall be given to any candidate who shall be declared elected at any general aldermanic election until after the date fixed by this act for the holding of the supplementary election herein provided for." (Art. XII, Part Four, Sec. 13, Cities and Villages Act.)

We are therefore constrained to hold that there is at present no vacancy in the 23d Ward except for the unexpired term of the late Alderman Kostner, and the position for the two years ensuing after April 7, 1925, can only be filled by an election called after that date. We will so notify

the Mayor, so that he may have an opportunity of vetoing the ordinance that was passed.

Inasmuch as we have come to the conclusion that the calling of the election was premature, there will be no necessity for taking up the question of the form of the notice to be published and posted.

Yours truly,

LEON HORNSTEIN,
Acting Corporation Counsel.

**Grounds Justifying Inspector of Weights and Measures
in Refusing a License.**

March 5, 1925.

HON. CARMEN VACCO, Inspector of Weights and Measures.

Dear Sir:

You have requested the Corporation Counsel for an opinion relative to your right to withhold a public weighmaster's license to the Virginia Coal Company. The facts, as you state them, are as follows:

Your department caught the Gaynor Coal Company using padded weight certificates in the delivery of coal. The partners were prosecuted in the Criminal Court of Cook County and the two partners were found guilty, one being fined \$1500 and the other being fined \$1000. Later, a corporation under the name of the Virginia Coal Company started doing business, and it is your information that the Gaynor Brothers are members of this corporation, but not officers, and were actually employed delivering coal sold by the corporation. On this state of facts you have refused the Virginia Coal Company a license as public weighmaster because of the connection of the Gaynor Brothers with the corporation.

It is true that an administrative officer, in the enforcement of the law, is vested with a certain discretion and judgment, and he may exercise his judgment, within the bounds of reason, by refusing a license for good cause, even though the ordinance does not specifically provide that a license shall be refused upon such a state of facts.

People ex rel. Carpenter v. Dever, App. Ct. No. 29342.

As an administrative officer, you should not refuse a license when all the requirements of the ordinance have been complied with, except for very good cause and upon certain knowledge of the facts. In our opinion, there is hardly sufficient ground upon the facts, as you state them, to warrant the refusal of the license. If the Gaynor Brothers are mere employes in this corporation, and have no controlling interest in the same or any voice in the management of its affairs, it would not seem just to refuse the corporation a license merely on these grounds. If, on the other hand, the Gaynor Brothers are connected with the corporation in such a way as to have responsible positions in which they are subject to no immediate superiors, and in which they would have opportunities for repeating their frauds upon the public, it is our opinion that you would then be justified in refusing the license. The most that can be said, in these cases, is, that you must exercise your judgment to the best of your ability, but that when the requirements of the ordinance are complied with, there should be a very strong and meritorious case for your refusal before you refuse to issue a license.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Settlement of Claim Against City for Dumping Above Grade in Violation of Contract.

March 6, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

You have submitted to this office a file of correspondence relating to a controversy occasioned by the use of the Tessville dump by the Bureau of Streets, involving a violation of the City's agreement by reason of filling above grade. An examination of the correspondence shows the facts to be as follows:

In February, 1918, the City of Chicago entered into an agreement with the Illinois Brick Company, the substance of which agreement was that the Illinois Brick Company, a corporation, which then owned certain land lying east of the Chicago & Northwestern Railroad, and about one-quarter mile north of Lincoln avenue, granted the City the right to dump on the land and fill up certain clay holes. It was, however, expressly agreed that the City of Chicago would not dump or fill in above grade, the agreement reading:

"It is understood that said City will fill said clay holes with material aforesaid to the grade or level of the surrounding land and not above, and when the amount of material dumped into said holes shall reach such grade or level, that the City will cause its workmen to level off and grade the same."

It appears that, pursuant to the said agreement the City entered upon the above described land, but the City violated the terms of its agreement by filling in the land three feet above grade. According to a letter dated October 31, 1924, signed by P. J. Carney, Superintendent of Dumps, it was stated:

"We were forced, for want of dumps, to fill this land three feet above grade. Private scavengers are not

to blame for this; according to the contract, we are bound to level the dump to natural surface and, since Mr. Bairstow is equipped with shovels and graders, I suggest that he be called in and an agreement reached by which he will level the dump for an agreed sum. This would be much cheaper than for the City to attempt this work."

An examination of the cost of leveling the said land to grade was made by Mr. G. B. Robinson, an Engineer employed by the City in the Department of Public Works, and Mr. Robinson states that,

"The minimum cost would be \$20,000, and it could cost as much as \$40,000 if hauled several miles. The City would save money by settling at \$20,000."

The land in controversy is now owned by one Harry Bairstow, who has purchased the same from the Illinois Brick Company, under an agreement whereby he succeeds to all the rights of the Illinois Brick Company against the City.

Under the above statement of facts, we are of the opinion that the City has clearly violated its agreement with the Illinois Brick Company by filling in the land above grade. By the terms of the agreement between the City and the Illinois Brick Company, the City obligated itself not only not to fill in the land above grade, but further that it would level off the land to grade. We are of the opinion that the City could be required to perform this work, and to level off the land to grade, or, if sued for damages, that damages could be recovered against the City.

This office has taken this matter up with the attorneys representing Mr. Bairstow, and the following offer for settlement has been made:

1. Bairstow will accept \$13,500 upon condition that he be allowed to dump, without charge, in the City dump adjacent to his tract of land all excess materials of every kind to bring his land to grade, or
2. If Bairstow is not allowed to so dispose of such materials in said City dump, then he will accept \$16,000.

It seems clear that if the above stated facts are true, it is to the City's advantage to accept one of the two offers of Mr.

Bairstow. This office has no means of investigating the facts, and must take the reports of Mr. Carney and Mr. Robinson as true. If, as stated in the above mentioned reports, the City has dumped on this land in violation of the agreement to three feet above grade, and if the cost of removing this material, if done by the City would amount to from \$20,000 to \$40,000, it is recommended that the offer of settlement be accepted.

The question of whether the first or second offer should be accepted is, of course, a matter which must be decided by the Department of Streets. Should you decide to accept one of these two offers, will you kindly notify this office in order that we may prepare a Council order authorizing the City to accept this settlement? All correspondence in the above matter is herewith returned.

Respectfully submitted,

ALBERT H. VEEDER,

Approved: *Assistant Corporation Counsel.*

LEON HORNSTEIN,
Acting Corporation Counsel.

Claim for Damages to Automobile from Striking Hole in Street.

March 11, 1925.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

In accordance with your letter of January 31, 1925, we submit herewith our opinion as to liability and a recommendation for settlement in the claim of Henry B. Parker for repairs to his electric automobile, damaged on January 1, 1924, at South Park avenue and 75th street, due to the defective condition of the pavement on South Park avenue.

It appears that while Mr. Parker was driving his electric automobile on South Park avenue about one-quarter of a block south of 75th street, the front wheels struck a hole

in the pavement, throwing the car out of control and upon a hydrant. A claim is presented for \$402.50 representing alleged damages as a result of the accident.

The law may be stated to be:

“The City is not bound, under law, to keep its streets absolutely safe. It is only bound to use reasonable care to keep its streets reasonably safe for ordinary travel thereon by persons using due care and caution for their safety. * * *

Municipal corporations cannot be held liable for every accident that occurs within their limits, but the defect must be such as could have been foreseen and avoided by ordinary care and prudence of the city authorities. * * * Whether a defect in the street is caused by the act of a third party or the failure of the City to repair in general, the City is not liable unless it had notice of the defect, or of such facts and circumstances as would by the exercise of reasonable diligence lead a prudent person to such knowledge.”

Boender v. City of Harvey, 251 Ill. 228.

It is self evident, therefore, assuming the facts alleged by Mr. Parker are correct, that in passing upon the question of the City's liability the matter of notice to the City is the deciding factor. Our investigation indicates that the faulty condition of the pavement existed for some time and was reported to the local office of the alderman. It is also contended that the City was notified in several other ways, but the Law Department is unable to locate a record of formal notice in the files of the various City Departments.

In our opinion it is for the City's interest to submit a compromise offer on this claim, and we therefore suggest that the Finance Committee offer Mr. Parker \$150 in full settlement. All files are hereto attached for your reference.

Respectfully submitted,

LAWRENCE J. FENLON,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Bents and Piers of Kensington and Eastern Railroad Company in Torrence Avenue.

March 12, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Replying to your letter of the 11th ult. asking advice concerning the relative rights of the Kensington and Eastern Railroad Company and the City of Chicago at the point where Torrence avenue crosses the right of way of said railroad company, we beg leave to submit the following report.

The ordinance passed by the City Council July 17, 1918, providing for the opening of said Torrence avenue between East 130th street and East 134th street described the way to be obtained by condemnation and to be opened across the right of way of said Kensington and Eastern Railroad Company as follows:

"That part of the right of way of the Kensington and Eastern Railroad Company in the northeast one-quarter (N. E. $\frac{1}{4}$) of said Section thirty-six (36) lying between a line extending from a point in the south line of said northeast one-quarter (N. E. $\frac{1}{4}$) one hundred ninety-two and ninety-one one hundredths (192.91) feet west of the southeast corner thereof to a point in the east line of said northeast one-quarter one hundred fifty-two and seventy-seven one-hundredths (152.77) feet north of said southeast corner and a line extending from a point in the south line of said northeast one-quarter (N. E. $\frac{1}{4}$) eighty-six and sixty-five one-hundredths feet west of said southeast corner to a point in the east line of said northeast one-quarter (N. E. $\frac{1}{4}$) of Section thirty-six (36) sixty-eight and sixty-two one-hundredths (68.62) feet north of said southeast corner."

In the City's action to condemn the necessary way for the opening of said Torrence avenue, said description (which calls for a street approximately sixty-six (66) feet in width)

is repeated in identical terms in the City's petition, the verdict of the jury, the judgment order of the court and the order of possession.

Said Kensington and Eastern Railroad Company in its answer and cross-petition, filed in said condemnation case, set out its position and contentions in respect to the opening of said Torrence avenue across its said right of way in the following terms:

"2. This defendant says it has a bridge upon its right of way at the point of said proposed crossing, the girders and superstructure of which are approximately twenty (20) feet above the present ground line at said proposed crossing; that said bridge is approximately Six Hundred Fifty (650) feet long and of the value of, to-wit, \$500,000.

3. This defendant says that if it should be required to remove that portion of its bents, piers, pedestals, and other structures and parts of said bridge, within the limits of said proposed street at said proposed crossing, it would entail an actual expense upon this defendant of more than \$100,000, and otherwise do to the property of this defendant irreparable damage.

4. This defendant says that it does not object to the vacant portion of its said property at said crossing being used by the City of Chicago for street purposes and avers that there is abundant room for all practical purposes for said proposed street to be laid out, maintained and used for all practical purposes at said proposed crossing without disturbing the bents, piers, pedestals and other structures and parts of said bridge of this defendant within the limits of said proposed crossing.

5. This defendant prays, therefore, that whatever judgment shall be entered in the premises contain such provisions and conditions as will enable it, this defendant, to maintain its said structures within the limits of said right of way or in the alternative adjudge that in case the same or any part thereof is disturbed the said City of Chicago shall be required to pay for the same."

We have set out the contentions of the Company in so great detail because said contentions thereafter became a matter of negotiation between said Company and the Board of Local Improvements which resulted in the withdrawal of

the Company's objections to said crossing of its right of way and the assessment of one dollar as damages to said Company from the opening of said street across the Company's right of way in consideration of which said Board of Local Improvements assented to and instructed its attorneys to allow to be inserted in the verdict of the jury and the judgment order of the court the following terms and provisions:

"As to the property and right of way of the Kensington and Eastern Railroad Company which it is sought to extend the public street in question, namely, Torrence avenue, across, as prayed for in the petition of this cause, the jury finds that at said proposed crossing the railroad tracks of the Kensington and Eastern Railroad Company are elevated to a height of more than sixteen feet above the proposed roadbed when completed; that the piers and columns supporting said bridge occupy a portion of the ground within the line of the extension of said proposed street and especially the west half thereof; that on the east half of the proposed street there is an open space between the said piers and columns, of at least twenty-four feet which is convenient for the traveled part of said proposed roadway without interfering with any portion of the structures of the said Kensington and Eastern Railroad Company or said elevated tracks; that the public necessities will not require at said proposed crossing a roadway to exceed twenty-four feet.

The jury further finds that if the said Kensington and Eastern Railroad shall be required to remove that portion of its structure supporting said elevated railroad tracks from the limits of said proposed street when extended across its right of way and lands, it would be entitled to damages of more than one hundred thousand dollars (\$100,000).

The jury further finds that it is not necessary for the proper public use of said street after opened that any portion of said structure of the said Kensington and Eastern Railroad Company shall be disturbed. The jury finds that the Kensington and Eastern Railroad Company is willing to permit said City to extend said street across its right of way and waive all damages therefor provided no portion of its elevated structure or piers and columns supporting same shall be disturbed, injured or damaged.

The jury therefore finds that the public interests will be duly served by accepting said proposition of the Kensington and Eastern Railroad Company; that that portion of Torrence avenue crossing its right of way and lands that shall be improved shall be upon the east half thereof and within the limits of twenty-four feet, or between the piers and columns of the said Kensington and Eastern Railroad Company supporting its elevated tracks at said proposed crossing.

It is therefore ordered and adjudged in this proceeding that, in so far as the right of way, land and structures of said Kensington and Eastern Railroad Company is concerned, no portion of the railroad structure of the said Kensington and Eastern Railroad Company or the piers and columns supporting said railroad tracks or any part thereof shall ever be injured, damaged or disturbed; that the roadway of said Torrence avenue across said right of way and land that may be improved for public travel shall not exceed twenty-four feet in width and shall be so constructed, improved and maintained as to not interfere with the tracks or piers and columns supporting said tracks of the said Kensington and Eastern Railroad Company. If at any time in the future it shall become a public necessity to disturb, remove or damage any of the said structures of said Kensington and Eastern Railroad Company, then and in that event its damages shall be assessed and paid before doing so the same as if this proceeding were void and of no effect."

Said terms and provisions are also contained in the judgment order of the court, which includes and incorporates the verdict of the jury *in haec verba*.

We are, therefore, of the opinion that the City has acquired for street purposes the right to use said strip of land approximately sixty-six feet in width across said right of way between the lines above described subject to said condition that the bents and piers of the Company shall be allowed to remain as they are now. In event, however, the City shall at some future time demand the removal of said bents and piers to relieve said roadway from obstructions caused by said bents and piers, then the City must pay the reasonable cost of such reconstruction of said trestle and bridge as will

provide a trestle and bridge not supported by such bents and piers, and of a carrying capacity equivalent to that which the existing structure shall have at the time such removal is demanded.

Yours very truly,

C. M. DOTY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Right of Lieutenants in Fire Department to Take Promotional Examination for Chief of Battalion.

March 14, 1925.

HON. NICHOLAS R. FINN, HON. EDWARD J. EVANS, and HON. JOHN A. PELKA, Civil Service Commission of the City of Chicago.

Gentlemen:

On February 13, 1925, there was transmitted to us by Secretary William F. Foehringer of the Commission the petition and demand of the lieutenants of the Fire Department to be allowed to take the promotional examination for the position of Chief of Battalion, and the request was made "for an opinion on the petition and demand." Such opinion was rendered on February 15, 1925.

We now have your communication of the 26th of February, in which you state that "your opinion is based on an incorrect statement of facts as contained in said petition forwarded to you by this office." You say:

“We wish to respectfully advise that this Commission has classified the position of Lieutenant, Fire Department, recognizing a distinction between the duties of Captain and Lieutenant, in Branch IV, Class T, Grade 4; the position of Captain, Fire Department, in Branch IV, Class T, Grade 5; and the position of Chief of Battalion, Fire Department, in Branch IV, Class T, Grade 6.

“For your information, we wish to respectfully advise that the duties of a Captain, whether he be on actual duty or not, place him in command of his Company at all times. His orders must be obeyed by the Lieutenant; in the absence of the Captain the orders of the Captain must be carried out as directed. The Captain alone is held accountable for the care and management of all property of the Company, including equipment, hose, company quarters, supplies, etc. The Captain alone has authority to make requisitions for supplies and material. At fires, until the arrival of his superior officer, the Captain is in command of all companies who have arrived at the fire in charge of Lieutenants. All charges for infraction of rules must be referred to the Captain and approved by him before being forwarded to the Chief of Battalion. All of these duties are exactly those of a Captain and attach only to the rank or grade of Captain.”

We may say that quite a different case on the facts is presented by this statement than was presented by the petition. We reiterate, however, our opinion as originally given that

“this case presents rather a question of the exercise of sound discretion on the part of the Commission in classifying and rating these captains and lieutenants in reference to the higher position of battalion chief.”

Requested, as we were, to base our former opinion on the petition and its statement of the facts, we said: “We are inclined to regard the petition of the lieutenants as a strong one *because their services are identical with those of the captains.*” On the facts as now presented in your communication, we must say that such facts tend strongly to refute the statement of the lieutenants and to make impossible the sustaining of their contention. We believe, however, that this

is a case to be determined by the Commission on the facts rather than upon any opinion of the Law Department on the law involved.

It is said the Commission cannot agree with our stated conclusion that "the City Council, it seems to us, has abolished whatever distinction in rank was formerly recognized to exist between captains and lieutenants," and reference is made to the current appropriation for the two positions. Obviously, the Commission has taken our statement apart from its context and has failed to consider that it is a specific deduction from the two creative ordinances: the old ordinance, which in express terms creates the positions of captain and lieutenant to follow that of battalion chief, and the new ordinance, which makes no provision whatever for such positions. Not only is the distinction between the two positions no longer recognized by the Council, but the positions themselves as creatures of the Council are abolished. These positions exist now by act of the Fire Department in recognizing them and by act of the Civil Service Commission in classifying them. True it is that upon proper requisition appropriations for these positions have been made as for many other positions and employments not created by the Council. But it must be remembered that mere appropriation ordinances do not create offices and positions in the civil service of the City.

Bullis v. City of Chicago, 235 Ill. 472, 478.

Moon v. Mayor, 214 Ill. 40.

Kenneally v. City of Chicago, 220 Ill. 485.

Very truly yours,

FRANCIS J. VURPILLAT,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

(Editor's Note: See previous opinion on the same subject, *supra*, under date of February 15, 1925.)

Liability of City Through Failure of Gate Arms and Derail Switches to Work Properly.

March 26, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have your letter of January 27th, requesting an opinion from this office concerning the possible liability of the City for any damages that may result by reason of the failure of gate arms and derail switches to work properly.

As I understand it, the operation of the derail switch is entirely dependent on the operation of the gate arm maintained by the City.

Liability in all damage claims, personal or property, is, as a general rule, imposed upon the party directly responsible for the proximate cause of the injury.

If an injury results from the failure of a derail switch to operate, and such failure is caused by the failure of the gate arm to operate, it is not inconceivable that the City might be held to respond in damages. A common carrier of passengers is required to exercise the highest degree of care for the safety of its passengers consistent with the mode of conveyance adopted and the practical operation of the road. Under this familiar rule a passenger injured by a failure of a derail switch to properly operate would undoubtedly proceed directly against the company. There is, of course, the possibility of joinder of the City as a party defendant, or of an action over by the company against the City in the event of a recovery against the company.

It is naturally difficult to foresee what evidence might be introduced in such cases, and correspondingly difficult, therefore, for us to say what the probable result would be.

Accordingly we feel that your suggestion of a saving clause in the permits is very advisable and well taken, and

we would suggest the following as a proper provision to be included in the permit.

“It is expressly understood and agreed between the City of Chicago and the grantee of this permit, that this permit is issued with the distinct reservation and condition that the grantee shall forever indemnify and save harmless the City of Chicago from any and all loss, damage, claim or claims for damage, judgments, costs, decrees and expenses of the same which it may suffer, or which may be obtained against said City of Chicago by reason of the granting of this permit and the privileges and authority herein contained, or by reason of the exercise by said grantee, its lessees or assigns, of the privileges hereby granted.”

We believe that this provision will be an ample protection to the City.

Yours very truly,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Frontage Consents for Junk Yards.

March 14, 1925.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge receipt of your letter of March 9th. You state that the J. Slavin Scrap Iron & Metal Company claim that they have purchased the property at 2309 North Robey street, and that they wish to use the same for the storage of junk and second-hand metal.

The premises where it is proposed to store this metal are on Robey street at the corner of the first alley south of Lister

avenue. Lister avenue, you state, between North Robey street and Binzo street (the next easterly intersecting street) is residential as defined in the ordinance.

You wish to be advised whether under Section 921 of the Municipal Code frontage consents are required on Lister avenue, because of the fact that the premises of the proposed junk yard abut on the alley upon which are the rear entrances to the lots which front on the south side of Lister avenue.

When we come to the proper interpretation of the provisions of the various frontage consent ordinances, perplexing and difficult questions usually present themselves, and in the solution of these questions little help is to be obtained from reports of adjudicated cases in the law books because of the fact that the decision in each case is based more or less upon the peculiar facts of the particular case, the phraseology of the frontage consent ordinance relied upon, etc.

In passing upon such question, therefore, we must endeavor to arrive at a reasonable interpretation of the ordinance and one that is in consonance with its general intent and purpose. The purpose of frontage consent ordinances is manifestly to protect residence blocks from the encroachment of businesses which, while not necessarily nuisances *per se* may be of such character that they become nuisances when conducted in particular localities and under certain conditions.

From the facts in this particular case it appears that the premises on which it is proposed to maintain this junk yard do not front in any sense on Lister avenue. They do, however, abut upon the first alley south of Lister avenue and the question presents itself as to the physical characteristics of this alley. On one side of the alley is the right of way of the Chicago & Northwestern Railroad and the proposed junk yard could hardly be said to be objectionable to that. On the other side of the alley (and the side upon which abut the premises of the proposed junk yard and upon which side are the rear entrances of the lots which front on the

south side of Lister avenue) are several sheds, etc. The character of the improvements in said alley would seem to be such that there would be no reasonable basis for the requiring of frontage consents.

Section 921 of the Municipal Code in so far as it is applicable to the present case, provides as follows:

“It shall be unlawful * * * to locate * * * on any lot fronting on any street or alley in the city in any block in which one-half of the buildings on both sides of the street are used exclusively for residence purposes * * * any place for storing junk * * * without the written consent of the majority of the property owners according to frontage on both sides of such street or alley.”

A block as defined by Section 920 of the Municipal Code reads as follows:

“920. *Definition of word ‘block.’*) Whenever a provision is made in this chapter that frontage consents shall be obtained for the erection, construction, alteration, enlargement or maintenance of any building or structure in any block, the word ‘block,’ so used, shall not be held to mean a square, but shall be held to embrace only that part of a street bounding the square, which lies between the two nearest intersecting streets, one on either side of the point at which such building structure is to be erected, constructed, altered, enlarged or maintained, unless it shall be otherwise specifically provided.”

The lot upon which it is proposed to locate this business abuts, I am advised, on North Robey street for about 75 feet and upon the alley for about 45 feet. The office of the business, I am told, is to be entered from Robey street and there is to be an entrance to the junk yard on the alley which adjoins the right of way of the Chicago & Northwestern Railway Company.

Where premises so abut both upon a street and upon an alley as in this case, it is my belief that it is not the intent of the ordinance to apply to such cases the words “fronting on any * * * alley in the city in any block,” etc. In such a situation, I think the premises should be regarded as front-

ing upon the street—in this case Robey street. The words “fronting on any alley * * *” in my opinion are intended to cover cases where it is sought to establish a business, intended to be regulated by Section 921, in the interior of a block, and where the premises front only upon an alley and not upon any street.

Where, however, premises front upon a street as in the case here, I feel that the street upon which the property fronts governs the situation, and if the block on Robey street in which this proposed yard is to be located comes within the purview of the ordinance as one which requires frontage consents, then frontage consents are necessary on Robey street. Further, concerning the securing of frontage consents in the block on Lister avenue between Robey street and Binzo street, I have grave doubts as to whether the premises upon which it is proposed to locate this junk yard are in the said Lister avenue block under the definition of a block given in Section 920 of the Chicago Municipal Code. The said premises I feel are in the North Robey street block as they front upon North Robey street.

In accordance with your request, I am expressing no opinion as to whether or not the proposed business comes within the classification of a junk yard under the ordinances or upon any other question except the one herein upon which you specifically request an opinion.

Upon careful consideration of the matter I do not believe, in so far as any matter in relation thereto has been called to the attention of this department, that frontage consents are required on Lister avenue, because the proposed junk yard lot, which fronts on North Robey street, abuts upon the alley (south of Lister avenue) upon which are the rear entrances to the lots that front on Lister avenue.

Very truly yours,

WILLIAM L. SULLIVAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Issuing of Warrants Where There Has Been an Assignment or Power of Attorney.

March 18, 1925.

HON. LOUIS E. GOSSELIN, Deputy Comptroller.

Dear Sir:

Your communication addressed to the Corporation Counsel requesting an opinion as to the proper method of issuing a warrant where there has been an assignment or power of attorney filed in your office, or where some person acts as trustee, has been referred to the undersigned for consideration and reply.

The forms of power of attorney and of assignment submitted for our consideration are as follows:

“Know all men by these presents, That..... do hereby make, constitute and appoint, irrevocably of the City of Chicago, County of Cook and State of Illinois, my true and lawful Attorney, for and in name and on my behalf to receive, collect and receipt for all sums of money, which are or shall become due, owing and belonging to me by the City of Chicago, upon or growing out of.....

..... and my said attorney is hereby fully authorized and empowered to do and perform all necessary acts and to sign all necessary papers for the said receipt and collection, and I hereby expressly waive the right of revoking this power of attorney. Any revocation of this power of attorney to be binding upon the City of Chicago, shall only be made by an endorsement of such revocation by the City Comptroller.

In witness whereof, I have hereunto set my hand and seal this day of, A. D. 19...

..... (SEAL)

State of Illinois, }
 County of Cook. }^{ss.}

I,, a Notary Public in and for said County, in the State aforesaid, do hereby certify that personally known to me to be the same person whose name subscribed to the foregoing instrument appeared before me this day in person and acknowledged that signed, sealed and delivered the said instrument as free and voluntary act for the uses and purposes therein set forth.

Given under my hand and Notarial seal this day of, A. D. 19....

.....

Notary Public."

"ASSIGNMENT.

FOR AND IN CONSIDERATION OF the sum of Dollars (\$.....), hereby sell and assign to any and all money of every nature, kind and description, due to from the City of Chicago on account of or in anywise growing out of

..... hereby authorize and direct the City of Chicago to pay to the said, any and all of the money aforesaid, and hereby authorize the said to receive and receipt for the said money or any portion thereof in name or otherwise as the authorities of the City of Chicago may require.

..... hereby further authorize the said to endorse name on any voucher, certificate, warrant or check issued by the City of Chicago for the payment of any money covered by this assignment, hereby authorizing the said to collect any money due by virtue of any voucher, certificate or check aforesaid.

IN WITNESS WHEREOF, I have hereunto set my hand seal this day of, A. D. 19....

..... (SEAL)
 (SEAL)"

The foregoing assignment bears the same form of acknowledgment as appears on the above power of attorney.

You will note that under the power of attorney above set forth, the attorney is merely authorized "to receive, collect and receipt for all sums of money, which are or shall become due, owing and belonging to" the claimant or judgment creditor. Such payment is to be made in the name of such claimant or judgment creditor and the warrant or voucher to be delivered to the person named as attorney.

On the other hand, under the form of assignment above set forth, the voucher or warrant should be made payable to the assignee named in such assignment and none other. If, however, under such assignment the voucher or warrant is made payable to the original claimant, we see no objection to its being delivered to the assignee and by him endorsed and negotiated as provided in said assignment.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Concurred in:

THOMAS A. SHEEHAN,

Attorney, Board of Local Improvements.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Procurement of New Consents for Filling Station When Applicant Decides to Enlarge Premises.

March 20, 1925.

MR. JOHN PLANT, Chief Fire Prevention Engineer.

Dear Sir:

This will acknowledge receipt of your letter of March 18th.

It appears that J. P. Ryan on January 25, 1925, made application to install a 1000 gallon tank for a filling station, on the north fifty feet of Lot 5, Block 6, Mackay's Subdivision of Block 16, Eggleston's 2d Subdivision in the North one-half, Northeast quarter of Section 28-38-14, known as Nos. 7141-43 Vincennes avenue; proper frontage consents were filed and permit 11227 issued to install the tank.

It further appears that thereafter complaint was made that the applicant or his successor started to erect a building to be used in connection with said filling station site on the adjacent premises known as 7145-47 Vincennes avenue; that on receipt of this complaint you required the applicant to procure additional signatures to the original frontage consents so as to cover all the ground he intended to use for filling station purposes, viz.: Nos. 7141-47 Vincennes avenue. With the original and additional signatures a surplus of 43.88 feet was shown.

The question you present is whether the frontage consents originally secured for a filling station at 7141-43 Vincennes avenue could be used for a filling station at 7141-47 Vincennes avenue.

My view of the matter is that when the applicant changed his plans from constructing a filling station at 7141-43 Vincennes avenue to 7141-47 Vincennes avenue, he should have filed an entirely new application and secured an entirely new set of frontage consents.

The purpose of these frontage consent ordinances are to protect the surrounding property. If the owners of said property desire to waive the right to insist upon the enforcement of a legal prohibition adopted for their benefit and comfort, they may do so.

Consents to a filling station to be located at 7141-43 Vincennes avenue are in no sense consents to a location of a filling station at 7141-47 Vincennes avenue. Some property owners doubtless would sign consents to the former that would not sign consents to the latter, as one is a much more extensive undertaking than the other.

The consents originally signed for 7141-43 Vincennes avenue are void in our opinion for the purpose of the establishment of an oil filling station at 7141-47 Vincennes avenue.

We do not think it is proper to take the two frontage consent petitions and consolidate them as was done in this case, as one of said petitions related to one location and the other related to an entirely different location.

In our judgment in this case a new frontage consent petition should be obtained for 7141-47 Vincennes avenue in accordance with the ordinance governing frontage consents for oil filling stations.

Very truly yours,

WM. L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Pension Rights of City Employe Transferred to Fire Department.

March 20, 1925.

THE RETIREMENT BOARD, Municipal Employees Annuity and Benefit Fund.

Gentlemen:

Complying with your request for an opinion as to the pension rights of F. A. Cincoski, the following is submitted:

The letter of Mr. Cincoski to your Honorable Body, dated February 18, 1925, states that he is now 46 years of age; has been a civil service employe of the Department of Gas and Electricity, Bureau of Fire Alarm Telegraph, for nearly 21 years; and is now first on the list for promotion to

Junior Fire Alarm Operator in the Fire Department, Fire Alarm office; that the change would involve the transfer of his name from the Department of Gas and Electricity payroll to the Fire Department payroll; that he would like to know what the effect of such transfer would have on his standing on the pension rolls.

1.

There does not appear to be any provision in the Firemen's Pension Fund Act under which services rendered in any other department of the City service can be credited as "the service of a fireman" in computing the time for the purpose of determining whether a beneficiary under that act has served 20 years as a "fireman" preliminary to becoming entitled to a pension payable out of the Firemen's Pension Fund.

2.

There does not appear to be any provision in the M. E. A. and B. Fund Act under which the pension rights of a municipal employe are disturbed by reason of his transfer from one department payroll to another department payroll. The only provisions relating to refunds and annuities, have to do with cases in which a municipal employe resigns, is discharged, or dies.

3.

The only provision of the M. E. A. and B. Fund Act which apparently bears upon the pension rights of a municipal employe who renders service in the Fire Department is Section 42 of the act, which provides that any service rendered by any municipal employe "as a fireman and regular member of the paid Fire Department of such city" shall be counted for annuity and benefit purposes as if such service was rendered as a municipal employe of the City, and any salary received by any municipal employe for such service

in such Fire Department shall be treated, for the purposes of the act, in the same manner as though such salary were received for the performance of duty as a municipal employe.

4.

Without passing on the question as to whether the mere fact of civil service classification in the fire service makes one a "fireman" within the intent of the pension laws, I am of the opinion that Mr. Cincoski has the right to continue as a beneficiary of the M. E. A. and B. Fund upon paying into the said fund, or causing to be deducted from his salary and paid into the said fund, the same salary percentage contribution which is now being credited to him, and to be credited for age and service annuity purposes with any service rendered by him in the future as a civil service employe assigned to the Fire Department of the City of Chicago, if he be transferred to such department, to the same effect as if such service was rendered as a municipal employe of the City in the Department of Gas and Electricity.

Respectfully submitted,

GEO. F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Pension Rights of Divorced Widow Who Remarries Pensioner Before Death.

March 24, 1925.

BOARD OF TRUSTEES OF THE FIREMEN'S PENSION FUND.

Gentlemen:

In reply to your letter requesting an opinion in the above matter, and enclosing a letter from Mrs. Nellie E. Collins, the following is submitted:

The letter of Mrs. Collins states that she was married to Michael J. Collins in the year 1883; lived with him for twenty years; that of said marriage she had four children, two of whom are still living; that she was obliged during that time to help toward the support of her said children and herself; that Mr. Collins was a victim of alcohol, and that to protect her children and herself from violence she was forced to leave him and apply for a divorce, which, I gather from her letter, was granted in 1903.

It appears that after Mr. Collins had retired on a pension and later found himself in the shadow of death, he grew repentant and asked for his former wife and sons in order that he might be reconciled to his family before his death. Mrs. Collins nursed him during his last illness and at his request remarried him that he might die happy; that subsequent to his death, a pension was granted to his mother on the ground that she was dependent, and a pension refused to his widow, Mrs. Collins, on the ground that she was the widow of a deceased fireman who had married such fireman subsequent to the date of his retirement upon a pension.

This is clearly not the character of marriage contemplated by the framers of the Pension Act, nor by the legislature in its passage. It was, unquestionably, the purpose of the act to prevent a deathbed marriage on the part of some conniving woman who might thereby seek to secure a pension as the widow of a deceased pensioner, and not to deprive of a pension the woman who had been the mother of his children prior to the granting of the pension.

However, it is not within the power of the Pension Board to change positive provisions of the Pension Act; only the legislature has this power, and in the absence of legislative action, the Board is required to adhere to the provision contained in Paragraph "A" of Section 10 of the Act, which reads as follows:

"No pension shall be allowed to the widow of any deceased fireman who has married such fireman subsequent to the date of his retirement with a pension under

the provisions of this Act and subsequent to June 30, 1915."

I am of the opinion that Mrs. Collins cannot be granted a pension under the provisions of the Firemen's Pension Fund as they now read.

I am returning herewith the letter of Mrs. Collins.

Yours respectfully,

GEO. F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Status of Pension Rights of Secretary of the Fire Department.

March 24, 1925.

THE RETIREMENT BOARD, Municipal Employees Annuity and Benefit Fund.

Gentlemen:

In reply to your letter stating that Mr. Edward A. Maloney, Secretary of the Fire Department, is desirous of having his status defined so far as the same relates to the Firemen's Pension Fund, the following is submitted:

Section 13 of the Firemen's Pension Fund Act provides, among other things, as follows:

"In cities which have adopted an Act entitled, 'An Act to regulate the civil service of cities,' approved and in force March 20, 1895, all persons who have been or shall hereafter be appointed to any position which is classified by the Civil Service Commission of such city in the fire service of such city * * * shall be included within the meaning of the word or term 'fireman' or 'firemen' as used in this Act."

If Mr. Maloney is classified by the Civil Service Commission of Chicago as being in the fire service, then Mr. Maloney is included within the meaning of the word "fireman" or "firemen" as used in the act, and is entitled to the benefits of said act, beginning with the date on which he was classified as in the fire service and began the payment of $2\frac{1}{2}$ per cent of his salary into the fire fund. Any prior service rendered by Mr. Maloney in any other department of the City cannot, however, be credited to him in the firemen's pension fund, as there is no provision in the Firemen's Pension Act for the granting of such credit.

Respectfully submitted,

GEO. F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Damages Caused by Negligence of Street Cleaner.

March 26, 1925.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

In accordance with your request of March 7, 1925, we return council paper in the claim of Mr. W. T. Donohue, 5429 Ellis avenue, for compensation for garage purported to have been destroyed by fire due to alleged carelessness of an employe of the City of Chicago on November 1, 1924. We also submit, as per your request, our opinion as to legal liability.

Irrespective of actual responsibility for the fire, in our opinion the City is not legally liable. Our Illinois courts of ultimate appeal have not passed directly upon the question of

whether or not the collection of garbage or the cleaning of streets and alleys by a municipality is in its governmental or private capacity, and there is a conflict of authority in certain states, but the greater weight of authority is to the effect that it is

“a public or governmental function and the municipality is not liable for the negligent acts of the persons employed therein, as it is acting for the state in the interest of the public health and general welfare and not in its private capacity.”

McQuillin, Mun. Corp. (1921 Suppl.), Vol. 8, Secs. 2636 and 2669.

19 Ruling Case Law, Par. 406.

14 A. L. R. 1471.

Scibilia v. Phila., 279 Pa. 549, 124 Atl. 273.

32 A. L. R. 981.

The City of Chicago, therefore, in our opinion, is not legally liable for the damage sustained.

Respectfully submitted,

L. J. FENLON,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Effect of Dismissal of Bill for Injunction Without
Specifically Dissolving Injunction—
Effect of Appeal.**

March 26, 1925.

MR. FOREST GARFIELD SMITH,
36 S. State Street, Chicago, Illinois.

Dear Sir:

Your communication of March 20th is at hand in which you call to the attention of this office the fact that in the case

of *Ranier Club v. City*, Superior Court No. 399496, an order was entered dismissing the bill for want of equity, but not dissolving the injunction. It is your contention that the fact that you have appealed from the order dismissing the bill leaves the injunction in full force and effect because the order failed specifically to dissolve the injunction. For the following reasons we are inclined to disagree with this contention:

The courts have consistently held, not only in this State, but in many other States, that an order dismissing a bill for want of equity, *ipso facto* dissolves the injunction. 32 C. J. 362, Section 603. In the case of *Thomsen v. McCormick*, 136 Ill. 135, it was held that when an order was entered dismissing out of the case all the charges in the bill upon which the injunction issued, the effect of said order was, in substance, a dissolution of the injunction, although no such order of dissolution was entered. In the case of *Billboard Publishing Co. v. McCarahan*, 180 Ill. App. 542, a bill upon which an interlocutory injunction was based had been dismissed. A writ of error was then sued out to review this order and was made a supersedeas. In an action brought for contempt, it was held that the injunction was not revived by the suing out of the writ of error and making the same a supersedeas. In the case of *Horrabin v. Iowa City*, 160 Iowa, 650, the court said that an injunction can exist only as an incident to some case pending in court, and when the case is dismissed or is otherwise disposed of the injunction falls with it; nothing is left to be heard or determined.

Section 21 of the statute on injunctions provides that:

“No appeal from a decree dissolving an injunction shall have the effect to continue in force the injunction unless the appeal is prayed at the entering of such decree and the court allowing the same shall so order, or unless the party praying the appeal shall, within ten days of the appeal is allowed procure from the Supreme Court, if in session, or a judge thereof, if in vacation, an order directing that the appeal shall have the effect to continue such injunction in force; and no such order shall be granted except for good cause appearing in the

records, or when the bill is dismissed by the complainant. The Supreme Court, or a judge thereof may for good cause extend the time for procuring such order."

It will be noted that the foregoing section applies only to orders dissolving injunctions and requires that an order be entered by the trial judge to the effect that an appeal from said order shall operate as a supersedeas. That is not the case here.

This office is, therefore, of the opinion that the injunction in the above entitled case is dissolved.

Very truly yours,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Right of Way to Vehicles Driven by Doctors.

March 27, 1925.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

We have your request of the 23d inst., in which you referred to an attached letter of inquiry from Dr. Thomas A. Carter, Secretary of the North Side Branch of the Chicago Medical Society, inquiring whether or not vehicles of physicians are permitted, in cases of emergency, to be given the right of way over other vehicles.

Please be advised that Article IV of Chapter LXXXII (Traffic Regulations) specifically grants such permission to physicians and others engaged in medical pursuits whenever there is displayed upon vehicles belonging to the medical profession the insignia adopted for their identification.

As to the specific complaint referred to in the doctor's communication, that of a police officer refusing to allow a left turn to be made when informed of an emergency case, it is our opinion that because the "left turn" prohibition is at present merely a police regulation, he acted contrary to the intent of the City Council's views as evidenced by Article IV hereinbefore referred to. Should the "left turn" prohibition become a part of our Code, we would consider that as another exception applicable to emergency cases.

Very truly yours,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Status of Applicant for Disability Pension Who Did Not Make Contributions Required by Law.

March 27, 1925.

THE RETIREMENT BOARD, Municipal Employees Annuity and Benefit Fund.

Gentlemen:

In reply to your request in re rights of James A. Hickey to ordinary disability benefits, the following is submitted:

Section 47 of the Municipal Employees Annuity and Benefit Fund Act, in force July 1, 1921, required that municipal employes less than 65 years of age should contribute certain payments to the ordinary disability benefit fund "*except those who are in receipt of duty disability benefits or ordinary disability benefits.*"

The records show that Mr. Hickey is under 65 years of age and did not make any such contribution or payment for

the last half of the year 1922 nor for any part of the year 1923; and Mr. Hickey was not during any of that period receiving duty disability benefits or ordinary disability benefits.

The mere fact that the paymaster, comptroller, or bookkeeper in charge of Mr. Hickey's salary accounts made deductions for ordinary disability benefits in January and July of 1924, did not of itself restore Mr. Hickey to any ordinary disability benefit rights, but was a deduction in error, as Sections 47 and 48 of the M. E. A. and B. Fund Act are specific as to the method in which ordinary disability benefits are to be secured and retained.

It appears from the records that Mr. Hickey suffered a fractured left leg on October 6, 1921, and was laid up in the hospital for ten weeks; that he was paid workmen's compensation in connection with said injury and had not applied for disability benefits; that he subsequently returned to work, but failed to qualify for the right to ordinary disability benefits under the Act of 1921 as required in Section 47 of the Act, which section contains the following provision:

"If any such municipal employe * * * shall fail to pay the amount stated into the Annuity and Benefit Fund herein provided for, as stated, such municipal employe shall not have any right to Ordinary Disability Benefit thereafter, and * * * shall be exempt from the provisions of this section, unless such municipal employe shall apply for reinstatement and shall submit to an examination or examinations by a physician or physicians, designated by the Retirement Board to make any such examination, and shall be found by such physician or physicians to be in good physical condition. Any such municipal employe shall be required to pay a fee, not in excess of three (3) dollars, for any one such examination."

While it would have been possible and probably equitable for the legislature to have provided for a case of this kind by arranging for subsequent payments of omitted contributions by those receiving Workmen's Compensation benefits, the legislature did not do so.

Our Supreme Court has held that where there is a defect in the law, it is the province of the legislature and not

the court to correct such defect. (*Gersch v. City*, 250 Ill. 551.)

If the court with its broad powers has no such authority to correct a defect in the law certainly a pension board has no such power, unless the power is specifically conferred upon the board in the act creating the board. The only power given to the Board in this connection is found in Paragraph "G" of Section 6 of the Act, which section is as follows:

"Consider and pass upon all applications for annuities and benefits; authorize the payment of any annuity or benefit; and suspend any such payment or payments, in accordance with the provisions of this act."

I am of the opinion that under Section 47 of the Municipal Employees Annuity and Benefit Fund Act, Mr. Hickey's failure to make the payments required by the act has rendered him subject to the penalty provided in Section 47 hereinabove quoted, and in consequence of such penalty he is not entitled to ordinary disability benefits until such time as he is reinstated in accordance with the requirements of the act.

Respectfully submitted,

GEO. F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Revocation of Permit for Filling Station Upon Evidence of Fraud.

March 28, 1925.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

You have requested an opinion relative to affidavits which have been transmitted to you tending to show that

frontage consents for a filling station located at the northeast corner of Garfield boulevard and South Robey street were fraudulently obtained.

In a communication from Victor Frohlich, an attorney at law, it is stated that a gasoline station is being erected at the northeast corner of Garfield boulevard and South Robey street. It is further stated that the City Map Department shows that frontage consents were filed showing a majority of 17.81 feet. Two affidavits accompany the letter, one that of John F. Simonsis, stating that he is the joint owner of the property at 5435 South Robey street, Chicago; that his name was placed on the application for the said gasoline filling station, and that he did not sign the same, nor did he authorize anyone to do so for him. The second affidavit, that of his wife, states that she is the joint owner of the property at 5435 South Robey street, and that she signed the application on the representation that it was a consent for a private garage. Affiant further states that she repudiated the said signature when she discovered that the same was for a gasoline filling station, and that she so notified the City officials.

If these affidavits are true, the requisite amount of frontage consents has not been obtained. Further, if the affidavits are true, a gross fraud has been perpetrated by the applicants for this filling station. We believe that there is sufficient evidence of fraud and misrepresentation shown to warrant you in revoking the aforesaid permit.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Undertaker's License and Frontage Consents.

March 28, 1925.

HON. HERMAN N. BUNDESEN, Commissioner of Health.

Dear Sir:

This will acknowledge receipt of your letter of March 23, 1925, in which it appears that in 1924 a sun parlor addition was built to existing two apartment building at 4744 Washington boulevard, and that in the application for a building permit it was stated that the use to be made of the building was "two apartment residential building."

Since the change in the building, it is claimed Mr. Bradley, who resides in the second apartment and who is an undertaker by trade, has on two occasions conducted funerals from the first apartment; that the first apartment is fully equipped for mortuary purposes and that it is the intention of Mr. Bradley to continue to use these premises in his business as an undertaker, and that the said use violates Section 1902 and other sections of the Municipal Code of 1922.

Section 1902 of the Municipal Code reads as follows:

"1902. *Frontage consents.*) It shall be unlawful for any person, firm or corporation to establish or maintain a morgue or to carry on the business of an undertaker as defined in this article, that receives, in connection with such business, at his or its place of business, the body of any dead person for embalming or other purposes, on or along any boulevard or pleasure driveway, without the written consent of a majority of the property owners according to the frontage on both sides of such boulevard or pleasure driveway in the block in which such morgue or place of business is located; it shall also be unlawful for any person, firm or corporation to establish or maintain a morgue, or to carry on the business of an undertaker, as defined in this article, that receives, in connection with such business, at his or its place of business, the body of any dead person for embalming or other purposes, on or along any street in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, with-

out the written consent of a majority of the property owners according to the frontage on both sides of such street in such block; provided, that nothing herein contained shall apply to such location in the case of any person licensed as an undertaker and authorized to carry on such business at any such location at the time of the passage of this ordinance, nor to any block in any street on which street cars are operated. Such frontage consents shall be obtained and filed with the department of health before a license shall issue for such business."

If the first apartment in premises at 4744 Washington boulevard is being used to conduct funerals therefrom as a business venture, and if it is fully equipped as stated for mortuary purposes, then clearly frontage consents are required under the above Section 1902, which must be obtained and filed with the Department of Health before a license can issue for such business.

Very truly yours,

WM. L. SULLIVAN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

**Right of De Facto Appointee to Draw Pension When
He Held Position for Long Period of Time
and Appointment Was Never Questioned.**

March 31, 1925.

HON. AL F. GORMAN, Secretary, Firemen's Pension Fund.

Dear Sir:

Your letter dated February 4, 1925, requesting an opinion from the Corporation Counsel as to the right of the Civil Service Commission to promote the applicant (John C. McDonnell) to the position of First Assistant Fire Marshal without a competitive examination, has been received and the following is respectfully submitted:

We are informed by the Secretary of the Civil Service Commission that, at the time Mr. McDonnell was granted the title change from Second Assistant Fire Marshal to First Assistant Fire Marshal, namely, July 3, 1923, there was no rule or order existing in the Civil Service Commission which required that a competitive examination be held before such change could be made, and no rule existing prescribing standards of efficiency for the grading of Assistant Fire Marshals, or for the examination of candidates for order of rank among the Assistant Fire Marshals.

On July 3, 1923, and for a long time prior thereto, there was an ordinance in force in the City of Chicago, creating and regulating the organization of the fire department, which ordinance is set out in Chapter 29 of the Chicago Municipal Code of 1922. This ordinance provided that the fire department should include a Fire Commissioner, a Fire Marshal, a First Assistant Fire Marshal, a Drill Master, a Veterinary Surgeon, and such number of Assistant Fire Marshals, etc., as the City Council might by ordinance provide.

Article 5 of the said chapter prescribed the duties of the Assistant Fire Marshals, and made it the duty of the First Assistant Fire Marshal to take charge of the work of the Department in the absence of the Fire Marshal, and, in case of the absence of both the Fire Marshal and the First Assistant Fire Marshal from any fire, that the other Fire Marshals should have and exercise the duties and powers of the Fire Marshal, in the order of their arrival at the fire; and that in case of a vacancy in the office of Fire Marshal, the First Assistant Fire Marshal should discharge the duties of the Fire Marshal, until the vacancy should be filled through appointment by the Mayor, by and with the advice and consent of the City Council.

Since Mr. McDonnell is no longer in the service of the City of Chicago, the question of the regularity of his appointment to the office of First Assistant Fire Marshal is only important in so far as his pension rights are concerned. Section 8 of the Firemen's Pension Act merely provides that the pensioner shall be paid a monthly pension equal to one-

half the amount of the monthly salary attached to the rank he may have held at the date of his retirement, but not to exceed the sum of \$3,000 per annum. There is no question but that the rank which Mr. McDonnell held at the date of his retirement was that of First Assistant Fire Marshal. He was performing the duties of the First Assistant Fire Marshal and was drawing the salary of the First Assistant Fire Marshal. Furthermore, he held that office for more than a year, and the regularity of his appointment was never questioned in any way. It is clear, therefore, that the requirement of the Pension Fund Act was complied with, for at the time of his retirement, he was holding the rank of First Assistant Fire Marshal. We do not mean to hold, in this opinion, that if a person were appointed to a higher pension without promotional examination as a mere temporary appointee, he would necessarily be entitled to the pension of the higher rank. If an employe were appointed by temporary appointment to a higher rank merely in order to enable him to obtain a higher pension at the time of his retirement, there would be grave doubt whether the employe would be entitled to the higher pension. However, it is clear that since Mr. McDonnell held the rank of First Assistant Fire Marshal for a period of over a year his appointment was not a mere subterfuge to obtain a higher pension. Since, as we have above indicated, the requirements of the Firemen's Pension Act are fully complied with, it is our opinion that Mr. McDonnell is entitled to a monthly pension equal to one-half of the monthly salary attached to the rank of First Assistant Fire Marshal at the time of his retirement, but not to exceed the sum of \$3000 per annum.

The papers submitted in this matter are herewith returned.

Respectfully submitted,

ALBERT H. VEEDER,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Liability of City for Permitting Use of City-Owned Patented Patterns.

April 8, 1925.

HON. JOHN T. MILLER, Commissioner of Gas and Electricity.

Dear Sir :

We have your communication of the 14th inst., in which you raise the question of whether or not the City can be held responsible for permitting the use of City-owned patented patterns by The Western Electric Company, which company was the low bidder on a contract for the manufacture of malleable iron castings.

The City acquired these patterns through purchase from the St. Louis Malleable Casting Company (the company holding the patent rights) free of any restrictions as to the usage to be made thereof. By virtue of the acquisition of these patterns the City *ipso facto* secured an express license to make and use specimens therefrom for its own use. The question might be raised that an unrestricted use of patterns could not have been contemplated by the patentee when its patterns were sold at a prevailing market price without taking into consideration its continuing usage, and on that point in *Anderson v. Eiler et al.*, 50 F. R. 775, the court said :

“But whether the sum was disproportioned to the value of the special use is not important, in view of the fact that this use was distinctly in the minds of both parties, and that the money was paid and received on the basis of it.”

On the question as to the right of the City to sublet the manufacture of these parts from patterns in possession of the City we find that the sale of a pattern to use specimens of a patented article implies a right to make those specimens as well as to employ others to make them, and such license will protect those others in making them for the use of the

licensee. In *Johnson Railroad Signal Co. v. Union Switch & Signal Co.*, 55 F. R. 488, the court held:

“The appellant did for the railroad company, at its instance, only what the latter had a right to do under its license. The suggestion that it could not employ others to make the signals for its use, but must make them itself at its own shops, by its own workmen, is unwarranted by anything found in the license or elsewhere. As it had a right to make them the appellee is not interested in the place or manner of its exercise. Nor is there any support for the suggestion that the appellee is entitled to a profit on the manufacture. The right to such profit passed with the license, irrespective of the individual who might do the work.”

Bowers v. Lake Superior Con. & D. Co., 149 F. R. 988.

Elgin Wind Power & Pump Co. v. Nichols, 65 F. R. 215, 220.

You inform us of the fact that the patentee company presented its bid for this same work in competition with other bidders and offered no protest to the issuance of specifications, which carried notice that patterns of these particular castings were to be furnished by the City, and we feel that clearly the principle of estoppel forecloses interference with a continuing use being made of these patterns for municipal purposes.

In view of the above, our opinion is that said patentee company, having sold the City its patterns, by such act surrendered its rights thereunder, and you will accordingly instruct the successful bidder to fulfill the contract for this work.

Very truly yours,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Vote Necessary to the Legal Adoption of the Calumet
Harbor Nickel Plate Ordinance.**

April 8, 1925.

HON. GUY GUERNSEY, Chairman, Committee on Harbors,
Wharves and Bridges.

Dear Sir:

Your letter of April 3, 1925, making inquiry as to vote of the City Council necessary to the legal adoption of the Calumet Harbor Nickel Plate Ordinance, has been referred to the undersigned for opinion.

Section 13 of Article III of the Cities and Villages Act provides as follows:

“The yeas and nays shall be taken upon the passage of all ordinances, and on all propositions to create any liability against the city, or for the expenditure or appropriation of its money, and in all other cases at the request of any member, which shall be entered on the journal of its proceedings; and the concurrence of a majority of all the members elected in the City Council shall be necessary to the passage of any such ordinance or proposition: Provided, it shall require two-thirds of all the aldermen elect to sell any city or school property.”

You direct attention to Section 17c of the Harbor Act of 1913 which was an amendment passed in 1917 and is as follows:

“Every power, right or authority which by this act is granted to or conferred upon any such city or village, may be exercised by the concurrence of a majority of all the members elected in the City Council of such city or village.”

You also refer to Sections 2 and 6 of the Lake Calumet Harbor Act of 1921 as incorporating the Act of 1913.

Section 17c above quoted refers only to the power, right and authority granted or conferred upon cities by the 1913 act. I have carefully examined the 1913 act and find that it does not provide for the sale of City property. Inasmuch as this Section 17c is restricted and limited in its force and effect to the Harbor Act of 1913 of which it is an amendment, I therefore conclude that it has no application to or is not a limitation of or an amendment of Section 13 of Article III of the Cities and Villages Act above quoted.

As to Sections 2 and 6 of the Calumet Harbor Act of 1921 they refer to the Harbor Act of 1913 and contemplate the application and use of the Harbor Act of 1913 as a means of acquiring riparian rights and otherwise providing for the building of the Calumet Harbor. However, I am of the opinion that the two Harbor Acts of 1913 and 1921, respectively, are separate and distinct acts and that the Harbor Act of 1921 is not an amendment of the Harbor Act of 1913, but rather that the two are to be construed and applied together.

Article 1 of Section 3 of the Calumet Harbor Nickel Plate Ordinance (see page 6 of pamphlet 125) provides in part as follows:

“The City hereby conveys and quit-claims unto the Company, the following described real estate in the City of Chicago, County of Cook and State of Illinois:

(a) A railroad right-of-way, generally one hundred (100) feet wide, known and to be known as the Lake Calumet Harbor railroad right-of-way;” * * *

Under decrees already entered by the Circuit Court of Cook County and to be entered, the City of Chicago has acquired the one hundred (100) foot strip to be used as the above mentioned right-of-way. This then is property of the City of Chicago, and I am of the opinion that the language above quoted from the ordinance, when carried out, will constitute a sale of city property, and therefore, that the legal adoption of the above mentioned ordinance will require the

affirmative vote of two-thirds of all the aldermen elect of the City Council.

Respectfully submitted,

JAMES T. SKINNER,
Special Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

**Claim Against City for Giving Incorrect Information
as to Location of Water Main.**

April 10, 1925.

HON. GUY GUERNSEY, Chairman, Sub-Committee on Miscel.
Claims, Committee on Finance.

Dear Sir:

We return Council papers and reports in the claims of E. Baggott Company in the sum of \$361.50, for extra expense incurred in locating the 12-inch water main in West Adams street, 35 feet west of La Salle street, due to alleged inaccuracy in the City's records in showing the correct location of the main.

The original Plat Book, in the office of the Water Pipe Extension Division, shows the correct location of the main in question, but apparently in copying the record in the Copy Plat Book the main was incorrectly located. However, in our opinion the City of Chicago in furnishing information regarding the location of its mains is not an insurer of the correctness of the records or of any information advanced.

As a matter of fact, by referring to the original Plat Book or by simply lifting the lid of the basin containing the controlling valves, on the scene of the street opening, the

employees of E. Baggott Company could have easily ascertained the exact location of the main. The latter procedure is invariably followed by plumbers engaged in work of this nature.

In view of these circumstances, in our opinion the City of Chicago is not legally liable for the extra expense incurred by E. Baggot Company.

Respectfully submitted,

LAWRENCE J. FENLON,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Classification of Certain Policemen as to "Present Employees" or "Future Entrants."

April 10, 1925.

THE RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY AND
BENEFIT FUND.

Gentlemen:

In reply to your inquiry as to the right of certain policemen to be classed as "present employees," I submit the following:

I.

Your letter of March 27, 1925, states that a number of policemen were discharged in 1921 upon charges filed and heard by the Civil Service Commission; that certain policemen filed their petitions for a rehearing within the period provided for by the rules of the Civil Service Commission; that

the said petitions for rehearing were not passed upon by the Civil Service Commission until July 3, 1923, at which time the Civil Service Commission acted upon the petitions, set aside the former order of discharge and restored the names of the said policemen to the reinstatement list for reassignment to duty.

II.

The rules of the Civil Service Commission provide that when charges are filed and a finding of guilty on those charges made against civil service employes, such employes may file a petition for rehearing, and that upon the granting of such petition, there is a hearing of the *charges de novo*.

III.

It is a rule of law that whenever judgment has been entered or ruling made, followed by a petition for rehearing, said judgment or ruling is suspended and does not become final until the petition for rehearing has been disposed of. It is a matter of justice that a man against whom an order or finding has been made, and such order thereafter vacated, should not be penalized by being deprived of his rights because of the mere entry of the order or ruling, and to this end the Civil Service Commission has provided in its rules that the seniority rights of an employe shall not be affected upon his reinstatement but shall be preserved to him.

IV.

I am of the opinion that as to the policemen in question, any policeman discharged after and as a result of a trial before the Civil Service Commission prior to December 31, 1921, and who filed a petition for rehearing under the rules of the Civil Service Commission, and whose petition was allowed and resulted in the vacating of the order of discharge subsequent to December 31, 1921, and who was restored to

active service in the police department, shall be classed as a "present employe."

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Effect of Resignation and Later Withdrawal Upon Pension Rights.

April 10, 1925.

THE RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY AND
BENEFIT FUND:

Gentlemen:

In reply to your inquiry as to the pension rights of Agnes B. Whalen, I submit the following:

I.

Your letter states that Mrs. Agnes B. Whalen was born January 3, 1867 and became 57 years of age on January 3, 1924; that she was originally employed by the city as a janitress by the Board of Education and worked in different capacities for the Board of Education and Department of Health up to September 1, 1910; that she was laid off and reinstated March 1, 1911, as a matron in the Police Department; that she resigned therefrom December 30, 1921; that she withdrew her resignation January 13, 1922, and was reinstated January 14, 1922; that up to December 30, 1921, Mrs. Whalen was contributing to the Municipal Employees Pension Fund; that at the time she resigned, she had a credit in the Municipal Employees fund of 20 years of service; that

subsequent to her resignation above mentioned, she applied to the Municipal Employees Pension Fund for a pension which was granted on January 17, 1922, but was never paid because she had withdrawn her resignation and was reinstated as a matron; that on January 21, 1922, the Municipal Employees Pension Fund turned into the Police Pension Fund all contributions made by matrons (except Mrs. Whalen's) to the Municipal Employees Fund prior to 1922, pursuant to an order of the City Council transferring matrons to the Police Pension Fund; that the contributions of Mrs. Whalen were not transferred to your fund but remained with the Municipal Employees Pension Fund.

II.

The withdrawing of a resignation filed with the Civil Service Commission is not a right conferred by law but is a privilege extended by the Civil Service Commission; and a request to withdraw a resignation might or might not be granted, according to whatever might be the ruling of the Civil Service Commission upon consultation with the head of the department to which the resigner had formerly been certified.

When Mrs. Whalen resigned on December 30, 1921, she ceased to be a municipal employe, and the withdrawal of her resignation and reinstatement on January 14, 1922, was merely a restoration of her name through the favor of the Civil Service Commission to the reinstatement list without the necessity of a civil service examination.

III.

I am of the opinion that Mrs. Whalen, upon her retiring from the service, is entitled to be paid from the Municipal Employees Pension Fund the pension for which she applied and which was granted to her on January 17, 1922.

I am of the further opinion that so far as the Policemen's Annuity and Benefit Fund is concerned, Mrs. Whalen

is to be classed as a "future entrant" and to be granted the benefits provided for "future entrants" of like age, excepting that her period of service should date from January 14, 1922, without credit for service prior to that date, for the reason that service prior to that date has already been credited to her in connection with her application for pension to the Municipal Employes Pension Fund.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Fire Hazard Upon the Chicago River.

April 13, 1925.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

You have advised this office that an oil barge, 142 feet long and 37 feet wide, with a total carrying capacity of 114,000 gallons in 9 compartments is towed up the Chicago River three times a week. This barge is a steel hull with a flat deck, and has no power. It is hauled into the city from Lockport, Illinois, and is used to transfer gasoline to a station at Archer avenue on the south branch of the river and also to a private oil yard at 1654 Kingsbury street.

You further state that on the stern of the barge is a room ten feet wide, ten feet long and eight feet high. It extends five feet below and five feet above the deck. This room is used for sleeping quarters for the watchman, and has a coal-burning stove for cooking. There are three steam pumps below the deck used for unloading gasoline. Steam is furnished by the tug "Harvey," a coal burning tug, which tows the barge to and from Lockport. In your opinion, this boat creates a fire hazard upon the Chicago River, and you

wish to know what powers you have in order to forbid the entrance of the barge into the city.

The Supreme Court of the United States has frequently held that although Congress has authority to regulate the use of all navigable waters within the United States, nevertheless, this authority is also vested in the states, and may be exercised by states concurrently with Congress, unless Congress has indicated an intention to exclude the jurisdiction of the States, or unless regulations of the State conflict with those of Congress (*Cummings v. City of Chicago*, 188 U. S. 410; *Dupont v. Miller*, 310 Ill. 140). Although the City of Chicago has been delegated quite general police power over the navigable waters lying within its jurisdiction, our ordinances contain no regulations relative to fire prevention in such waters. The ordinances of the City of Chicago creating the harbor master and giving him general police power over the harbor do not contain fire regulations. The reason for the lack of such municipal regulations probably is due to the fact that the Federal statutes contain minute regulations over navigable waters, and in particular contain such regulations with respect to fire prevention. Thus, Section 7441, of Barnes' Federal Code of 1919 contains regulations as to the mode of packing dangerous articles, including gasoline, and Section 7733 provides that when gasoline and similar commodities are carried, they shall be packed in accordance with the provisions prescribed by the Board of Supervising Inspectors and approved by the Secretary of Commerce and Labor. Sections 7436 to 7449, inclusive, contain minute regulations relative to fire hazards.

We therefore advise you that you notify the federal authorities of this fire hazard and request them to take such action as the law provides.

Respectfully submitted,

ALBERT H. VEEDER,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

**Contract Between City and Illinois Bell Telephone Co.
for Publication of Directory.**

April 14, 1925.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

In response to your request of January 20th for an opinion from this office as to the propriety or regularity of an arrangement the Illinois Bell Telephone Company has with the R. H. Donnelley Company for the publication of an alphabetical telephone directory, we submit the following:

We understand from your communication that the Telephone Company formerly printed, published and distributed the directory itself and paid compensation to the City on the gross revenue derived from the advertising contained in the book without any deductions for the cost of publication or distribution, and under its arrangement with the Donnelley Company the Telephone Company now receives a percentage of the advertising revenue as against the former total revenue, and that it is on this percentage that the Company is now paying compensation to the City. The practical effect of this arrangement, so far as the City is concerned, seems to be that from the advertising revenue the cost of printing and distribution and the Donnelley Company's profit are deducted, thus reducing the amount of the compensation payable to the City. Your request is that we advise your office whether the City should object to this arrangement or make an additional claim for compensation.

Paragraph I of Section 5 of the Telephone Company's ordinance provides:

"said Chicago Telephone Company shall, at least three times during each year, print, publish, furnish and deliver to each of its lessees and subscribers in Chicago, free of charge, a directory containing in alphabetical order the names, addresses and telephone numbers of

all its lessees and subscribers in Chicago who have not requested in due time that their names be omitted," etc.

We think the practical interpretation of this provision is that the Telephone Company at stated intervals shall cause to be delivered to each of its subscribers a printed telephone directory containing the names, addresses and telephone numbers of all its subscribers in the City. The provision contains nothing that would indicate an intention on the part of the City Council that the Company shall publish and distribute the directory itself. The only imposition on the Company, so far as the ordinance is concerned, is that it shall cause such a printed directory to be furnished, but no method is prescribed by which such furnishing shall be done. There is nothing in this section, in our opinion, that would legally prevent the Company from making such an arrangement with the Donnelley Company, or any other printing company, as is outlined in your letter. The manner or method to be pursued in the preparation and distribution of such a directory is necessarily a matter of corporate discretion, and in the absence of anything in the ordinance to the contrary we know of no legal principle that would justify a court in undertaking to decree how such discretion should be exercised. The weight of authority is to the effect that unless such discretion is so grossly abused as to prejudice the rights of others the courts will not interfere.

Section 3, the compensation clause of the ordinance, provides that three per cent of all the gross receipts from all the business done by the Company shall be paid as compensation to the City, and we have heretofore construed this to mean three per cent of all the funds paid into the treasury of the Company without regard to their source except in so far as the decisions of the Supreme Court of this State have excluded one or two items. This provision is not necessarily limited to such funds as are actually paid into the treasury of the Company but is likewise inclusive of any funds that should be paid but that do not appear on the books, where there is some subterfuge or exchange of tele-

phone service for services for material or any other thing of value. However, we do not believe that there is anything in the present situation that would warrant an inquiry along such lines.

We assume, without knowing the actual fact, that this contract is advantageous to the Company and that it may tend to increase its net revenue and be a more economical method of directory distribution. Inasmuch as substantial economics of this character should tend to decrease the ultimate cost of service to telephone subscribers, it would be an unwise policy on the part of the City, aside from the legal aspects of the situation, to undertake to interfere with such an arrangement.

We believe that the Company was acting within its legal right in making such a contract with the printing company, and that the City is only entitled to claim compensation on the amount paid to the Telephone Company by the Donnelley Company.

Yours very truly,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Alley Between Loomis Street, Haines Street, Lyman
Street and 31st Street.**

April 15, 1925.

HON. THOMAS H. BYRNES, Superintendent of Streets.

Dear Sir:

We have your communication of March 27, 1925, concerning a supposed encroachment upon the public alley, cited

in the caption. You desire to be informed as to what action should be taken in regard to this matter.

It would seem that the supposed owners of the premises, of which the above described alley is a part, spread of record a plat of resubdivision of lots one (1), two (2) and three (3) in Wilder's Subdivision of lot five (5), block twenty-seven (27), Bridgeport, on the 23d day of January, 1877. In a subsequent proceeding in the Circuit Court, *Edmund Kennealy v. The City of Chicago, et al.*, No. 256723, the City's rights in the streets and alleys in the above mentioned resubdivision were litigated. Issues were found against the City and a decretal order of injunction was entered on October 1, 1912, which is in part as follows:

"Now therefore on consideration thereof, it is ordered, adjudged and decreed, and the Court doth hereby order, adjudge and decree as follows: viz. That the said City of Chicago and L. E. McGann, Commissioner of Department of Public Works, of the City of Chicago and Frank W. Solon, Superintendent of Streets of the City of Chicago, defendants, their agents and servants, be, and they and each of them are hereby perpetually enjoined and restrained from entering upon the Westerly Thirty (30) Feet of the Complainant's premises in said bill and this decree described, or any portion thereof, or any portion of the said Complainant's herein described property, and from occupying or using or attempting to use the same as a Public Street, or for any other purpose and from interfering with the Complainant Edmond Kennealy, his heirs and assigns in his or their occupation, use or ownership of the same, until the same may be hereafter legally acquired from the said Edmond Kennealy, his grantees, heirs or assigns."

The thirty (30) feet spoken of in this decree have since been conveyed to the City and are now used as part of a street. However, the records disclose no subsequent action or proceeding of any kind with reference to the alley in question.

The above mentioned decree has at no time been altered and is at this date in full force and effect. We are, there-

fore, of the opinion that the City has no right to interfere with the occupation of the alley cited in the caption above.

Very truly yours,

FRANK T. HUENING,

Approved: *Assistant Corporation Counsel.*

LEON HORNSTEIN,

Acting Corporation Counsel.

Interpretation of Ordinance Relative to "Tag Days."

April 15, 1925.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

Answering your letter of the 2d inst. transmitting letter of the Mt. Carmel Mutual Welfare Institute, inquiring as to whether or not churches and charitable organizations are required to obtain a permit before being allowed to solicit contributions, please be advised that under Section 2765 of The Chicago Municipal Code of 1922 it is specifically set forth that "The soliciting or collection of funds for charitable purposes upon the streets of the City of Chicago, except upon the 'tag days' designated by this Chapter is hereby prohibited."

However, the communication addressed to Alderman R. R. Jackson and your letter do not set out whether this solicitation is to take place on the streets, and therefore our opinion on this point is that no solicitation can be made on the streets except in accordance with the "Tag Day" ordinances, but solicitation can be made by other honorable means by a bona fide charitable institution without need of a permit for the purposes of solicitation.

Yours very truly,

JAY A. SCHILLER,

Approved: *Assistant Corporation Counsel.*

LEON HORNSTEIN,

Acting Corporation Counsel.

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